No. 4971

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

PHOENIX-TEMPE STONE COMPANY, a Corporation, MARYLAND CASUALTY COMPANY, a Corporation,

Plaintiffs in Error,

vs.

L. DeWAARD et al.,

Defendants in Error,

and

STANDARD ACCIDENT & INSURANCE COMPANY, a Corporation,

Appellant,

vs.

L. DeWAARD et al.,

Appellees.

VOLUME I.

(Pages 1 to 416, Inclusive.)

Upon Writ of Error to and Appeal from the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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United States of America, District Court of the United States of America in and for the District of Arizona.

I.—413—PX.

L. DeWAARD, H. DeWAARD, and L. DeWAARD, Jr., Copartners, Doing Business Under the Firm Name and Style of DeWAARD & SONS,

Plaintiffs,

vs.

PHOENIX-TEMPE STONE COMPANY, a Corporation,

Defendant.

COMPLAINT.

Come now the plaintiffs above named, and complain of the defendant, and for cause of action against the defendant allege:

I.

That L. deWaard, H. deWaard, and L. DeWaard, Jr., are copartners doing business under the firm name and style of deWaard & Sons, having their principal place of business in the city of San Diego, State of California.

II.

That the Phoenix-Tempe Stone Company is a corporation, organized and existing under the laws of the State of Arizona, with its principal place of business in the State of Arizona, and being organized and domiciled in the State of Arizona, and having its principal place of business in the City of Phoenix, State of Arizona, with offices at Nos. 519 and 520, Luhns Building, in said city.

III.

That the said L. deWaard, H. deWaard, and L. deWaard, Jr., are all citizens of the State of California, residing and living therein, and having their principal place of business, as aforesaid, in the city of San Diego, California. [1*]

IV.

That the matter in controversy in this action exceeds, exclusive of interest and costs, the sum or

*Page-number appearing at the foot of page of original certified Transcript of Record.

value of Three Thousand Dollars ($3,000.00), and is of the sum or value of Sixty-one Thousand Five Hundred and Five Dollars and Twenty-two Cents ($61,505.22), and that of said amount Forty-one Thousand Five Hundred and Five Dollars and Twenty-two Cents ($41,505.22) is for goods, wares, merchandise and labor done and performed, all as more particularly hereinafter specified, and Twenty Thousand Dollars ($20,000.00) thereof is for damages.

V.

That on the 27th day of May, 1924, the plaintiffs herein entered into a written subcontract with the defendant herein, wherein and whereby it was agreed that the plaintiffs would subcontract from the defendant, and whereby the said plaintiffs did subcontract from the defendant for the construction of a portion of the Prescott-Phoenix Highway, known as Federal Aid Project No. 72–A, said work being fully described in the plans and specifications therefor issued by the State Engineer of the State of Arizona, and in the contract between the defendant and the State of Arizona, which said contract, and plans and specifications, are on file in the office of the State Engineer of the State of Arizona, and reference to which said plans and specifications, and contract, is hereby made. By said reference, the said plans and specifications, and contract are adopted into this paragraph as fully as though the same were set forth at length herein in words and figures.

That by the said contract between the parties hereto, of date May 27th, 1924, it was agreed that the plaintiffs should perform certain work in connection with said highway project, more particularly specified in said contract, and to perform such extra work as might be required by the said engineer in connection [2] therewith. Upon the performance of said work, the defendant agreed to pay the plaintiffs the sums specified in the said contract, and it was agreed that if any dispute arose out of the performance of such work, that such dispute should be settled by a board of arbitrators; that a full, true and correct copy of said subcontract of date May 27th, 1924, between the parties hereto, is attached hereto, marked Exhibit "A," and by reference thereto incorporated herein, and made a part of this paragraph as fully as though said subcontract was herein written at length in words and figures.

VI.

That immediately following the execution of said contract of May 27th, 1924, the plaintiffs entered upon and undertook the accomplishment of the work agreed to be done in said subcontract.

VII.

That in the said specifications hereinbefore referred to, and the plans attached thereto, there is a plan and specification for the Kirkland Creek Bridge to be constructed in connection with said highway project, and by the plaintiffs under said subcontract and that the plans for said bridge, contained in said plans and specifications, specify a

ground line, a ground water elevation, a rock elevation, and a high-water line in connection with the construction of said bridge, and that the said rock elevation line or contour, as shown on said plan, is shown by said plan to have been fixed and established by three test pits dug from the ground line through sand and gravel to the rock elevation at three points, approximately equidistant across the stream over which the said Kirkland Bridge is to be constructed, and that the said rock elevation is shown upon said plan to be the bedrock, upon which the piers and cylinders in connection with said piers are to be placed to support said bridge, and the said plans show [3] the dimensions of the cylinders and their heights above said rock elevation, together with their height in relation with the ground water elevation, the ground line and the high-water line.

VIII.

That on or about the 30th day of August, 1924, while in the prosecution of the work provided to be done in the said contract, and particularly while engaged in the construction of said Kirkland Creek Bridge, the plaintiffs discovered that the rock elevation or bedrock, as shown on said plans and as referred to in the last preceding paragraph, was not the elevation shown on said plans, and that in order to place the piers or cylinders in connection with said piers upon bedrock, it would be necessary to excavate to a depth greater than that shown and specified on the said plan.

That immediately thereafter and upon making said discovery the plaintiffs notified the defendant

thereof and informed the defendant that it would require additional equipment and a greater amount of labor and cost to excavate to a depth greater than that shown upon the plans, to encounter bedrock, and to place the piers thereon, and that such additional equipment and labor was extra work, and should be authorized to be done pursuant to the provisions of said subcontract.

IX.

That thereafter and during the months of September and October, the plaintiffs notified the defendant in writing of the fact that the plaintiffs had excavated to the elevation at which it was shown on the plans, bedrock would be encountered, and that bedrock was not to be found at such elevation; and that the plaintiffs had excavated below the elevation at which the plans showed bedrock was to be encountered, and that bedrock had not been encountered, and especially in the excavation for Piers 7, 8, 9, and 10, no indication of bedrock had been encountered [4] although plaintiffs had excavated to a considerable depth below the excavation shown on the plans, as the point at which bedrock would be encountered, and as described on the said plans by test pits sunk alongside the excavation made by plaintiffs; and that the extra work and the extra equipment necessary to continue excavation for the piers below the elevation shown on the plans at which bedrock was to be encountered, was extra work and work of such a character that it was not possible for plaintiffs to perform it with the equipment, material and labor then upon the site;

and that, therefore, if defendant desired the work to be done, that it was necessary for the defendant to comply with the terms of the contract and secure the authorization for the performance of such extra work.

That the defendant ignored all of said notices and demands on the part of the plaintiffs, and took no action whatever.

That on or about the 22d day of October, 1924, at which time the defendant informed the plaintiffs that the State Engineer required the excavation to be continued down to bedrock, no matter at what depth it might be encountered, nor how much equipment and labor might be necessary to make such elevation, but that it should be done at the same unit price for excavation to the depth shown on the plans and specifications; and that no provision would be made for payment, either as extra work or for the extra expense incurred by plaintiffs in the execution of such excavation.

That immediately upon receipt of this notice of the defendant, the plaintiffs immediately notified the defendant that it would be impossible to comply with the defendants' request; and that the plaintiffs relied upon their contract; and that the plaintiffs would not perform extra work unless authorized so to do as provided in said contract. [5]

That defendant has at no time authorized or requested the plaintiffs to continue the excavation for said piers as extra work, nor has it secured an authorization from the State Engineer to the plain-

tiffs to do such extra work, in conformity with the work clause of the said subcontract.

That by reason of the failure, refusal and neglect of the defendant to authorize the plaintiffs to do the excavation for said piers below the point shown upon the said plans at which bedrock was to be encountered, either under the extra work clause of said subcontract, or as extra work, plaintiffs have been compelled to maintain upon the site of the work being done under said subcontract, expensive material and equipment, and a field camp, and an organization of expert and ordinary laborers, whereby the plaintiffs have suffered great damages, as are more particularly hereinafter specified.

That in addition to the foregoing, the defendant has permitted other subcontractors of the said defendant engaged in the execution of work in connection with the said highway project in and about the said Kirkland Creek Bridge to so execute their work as to hinder and interfere with the plaintiffs in their execution of the work provided for in their said subcontract; and that such delay has compelled the plaintiffs to maintain a field camp, expert and ordinary laborers, and equipment upon the said site, and thereby the plaintiffs have suffered great damage, all as are more particularly hereinafter specified.

That the said ground line shown upon the said plans for the said Kirkland Creek Bridge was incorrect; in that the ground line at the points where the wing walls were to be constructed, is shown upon the said plans at a point about ten (10) feet

above the actual ground line encountered in the construction of the said wing walls by the plaintiffs; and that by reason thereof, the plaintiffs were compelled to and did install, and construct and [6] place a great amount of superstructure to support the said wing walls, that would not have been necessary had the ground line been at the elevation shown upon the said plans.

That the execution of such extra work compelled the plaintiffs to maintain laborers, both expert and ordinary, and a field camp, machinery and equipment upon the site under the execution of said work a much greater length than would have been necessary had the work encountered been as shown upon the said plans.

That the plaintiffs demand that they be paid for such work in the construction of said superstructure, as extra work, under said extra work clause of said contract; and that the defendant refused and continues to refuse, to pay therefor, whereby the plaintiffs have been greatly damaged, all as more particularly hereinafter specified.

That the water line shown upon the said plans for the construction of said Kirkland Creek Bridge was incorrect; in that the said water line was shown at a point much lower than that actually encountered in the prosecution of said work; and that there had been no rain in the water shed of said Kirkland Creek between the time the said water line was fixed and delineated upon said plans and the time the plaintiffs encountered it upon the prosecution of said work, sufficient to raise the

water line of said creek; and that in the execution of the work of constructing the said bridge, the plaintiffs encountered a water line at a point about two (2) feet higher than the water line, as shown upon the said plans.

That the additional height of said water over that shown by the said plans made it necessary for the plaintiffs to install additional equipment and machinery, etc., and do this in order to excavate sites for the said piers, and which greatly increased the cost of such excavation over the cost of such excavation, [7] had the point been at the point shown on the said plans.

That by reason of said delay caused by the said neglect and failure of the defendant to comply with the terms of the said subcontract, the time for the completion of the work of excavation for said piers was extended into the winter months of 1924, whereby the winter rains caused the said Kirkland Creek to rise and interfere with the work of excavating for said piers and constructing said bridge; and that if the said defendant had complied with their said contract, upon the said request of the plaintiffs so to do, the plaintiffs would have been able to have prosecuted the work of constructing said bridge, so that they would not have been damaged by reason of the said winter rains and rise in said creek, whereby the plaintiffs have been greatly damaged, all as more particularly hereinafter specified.

That after plaintiffs had executed the said subcontract of May 27th, 1924, and entered upon the

execution of the work therein provided, the defendant produced, to wit: On or about the 15th day of September, 1924, a set of plans for the construction of the said Kirkland Creek Bridge different from the plans theretofore exhibited by the said defendant to the plaintiffs and used as a basis for the said subcontract; and stated to plaintiffs that the original plans were incorrect, and that the new plans were the plans to be used and at which the plaintiffs would be required to construct the said bridge.

That the new plans showed and specified new and extra work not specified in the original plans, and the defendant insisted that plaintiffs tear down and reconstruct a portion of the said bridge already constructed, and refused to play the plaintiffs therefor, or for the extra work provided for in the said new plans and specifications; whereby the plaintiffs were damaged, all as more particularly hereinafter specified. [8]

That the defendant is required, under its contract in connection with the said highway, to cause fills to be constructed for the abutments and approaches leading up to said Kirkland Creek Bridge, upon which the plaintiffs are to construct their riprap and approaches to said bridge, and that the defendant has neglected and failed to do any of its said work in connection with the construction of said fills and abutments leading up to said bridge.

X.

That a portion of the work provided to be done by plaintiffs under said subcontract with the de-

fendant is for the construction of bridges, culverts, fences, barriers, and cattle-guards, and laying pipes, through a section of said work known and hereafter referred to as People's Valley; and that connection with the execution and performance of said work by plaintiffs, the plaintiffs were greatly hindered and delayed by other subcontractors of the defendant; whereby the plaintiffs were from time to time, during the months of June, July, August, September, October, November, and December, 1924, forced to temporarily abandon the execution of the said work in People's Valley, and to maintain a large organization of trained and ordinary laborers, together with a camp, equipment, teams and machinery; whereby the plaintiffs were greatly damaged and the cost of the execution of their said work greatly increased, all as more particularly hereinafter specified.

That in connection with the said work in People's Valley, defendant required of the plaintiffs the construction of ten (10) cattle-guards, and after the plaintiffs had constructed five (5) of said cattle-guards, and had partially constructed the remaining five (5), the defendant paid the plaintiffs for the five (5) completed, but refused to pay the plaintiffs for any of the work done in connection with the construction of the other [9] cattle-guards, whereby the plaintiffs were greatly damaged, all as more particularly hereinafter specified.

XI.

That the original plans and specifications used as a basis for the said subcontract of May 27th, 1924,

specified that steel used in connection with the said work should be supplied cut to the necessary lengths in conformity and with the plans and specifications, and that through said changing of the plans and specifications for said work, on the said 15th day of September, 1924, it became necessary to recut the steel to conform to the new plans; and that the defendant has refused, and continues to refuse to pay plaintiffs anything therefor; whereby plaintiffs have been greatly damaged as hereinafter more particularly specified.

XII.

That in connection with the execution of said work, the plaintiffs excavated for a straight line culvert shown on the plans and specifications, and after the excavation had been made, the defendant required plaintiffs to re-excavate for a new and different type of culvert for said work, which the plaintiff did, and the defendant refused, and continues to refuse to pay for doing said work; and that the new and different type of culvert required a different type of form to be used in connection with the construction of said culvert, and the defendant refused, and continues to refuse, to pay plaintiffs anything, by reason thereof; and that the said changes in the construction of said culvert greatly increased the cost thereof and damaged the plaintiffs, as hereinafter more particularly specified.

XIII.

That the said plans and specifications required

the construction of approximately eight (8) fords; and that the said [10] plans and specifications for such fords required the construction of guard walls on each side of the roadway; and that in connection with such work, the plaintiffs made excavations for the construction of such guard walls and to install forms therefor; and that thereafter and before the said guard walls had been fully completed the defendant ordered that the work on the guard walls on one side of the roadway be abandoned and refused to pay the plaintiffs anything for their work done in the construction of the guard walls; whereby plaintiffs were greatly damaged, all as hereinafter more particularly specified.

XV.

That under the plans and specifications and said subcontract of May 27th, 1924, it was provided that the plaintiffs should be permitted to haul their material and equipment over the highway under construction; and that during the course of the work in the execution of said contract of May 27th, 1924, the defendant refused and prohibited the plaintiffs from hauling their said material over the said highway and compelled the plaintiffs to haul their equipment and material over a rough, temporary road, thereby causing the plaintiffs great additional expense in the transportation of their material and equipment; whereby the plaintiffs were greatly damaged, all as hereinafter more particularly specified.

XVI.

That on or about the 30th day of August, 1924,

in connection with the construction of the said Kirkland Creek Bridge, the plaintiffs requested the approval of certain abutments for the purpose of pouring cement; and that the defendant delayed such inspection for a period of four (4) days, at which time inspection was made, and that thereafter the plaintiffs completed the said abutments and *and* prosecuted the work on a superstructure diligently. [11]

That on the night of the 8th day of September, 1924, a heavy rain came and flooded the said abutment, and destroyed all of the work done thereon.

That had the defendant promptly inspected the said work upon the request of the plaintiffs, on or about the 30th day of August, 1924, they would have had sufficient time to complete the said structure, and that it would not have been damaged by the said rains; whereby the plaintiffs suffered great damages and incurred a large amount of extra expense, all as hereinafter more particularly specified.

That in the destruction of the said abutment by said rains, on the 8th day of September, 1924, the plaintiffs lost a large amount of machinery and equipment, that would not have been lost had the said inspection been made promptly as requested; whereby the plaintiffs incurred great damages, as hereinafter more particularly specified.

XVII.

That on or about the 4th day of September, 1924, and while inspecting the excavation for cylinders and piers to support the said Kirkland Creek

Bridge, the State Bridge Engineer and Federal Aid Project Engineer, both stated to plaintiffs that the excavation necessary to encounter bedrock below the elevation shown on the plans, was extra work, and would incur additional expense and costs to plaintiffs, and should be paid for as extra work, and ordered plaintiffs to proceed with such excavation, and assured plaintiffs that they would be paid therefor.

That the said State Bridge Engineer was in charge of the work and had authority to represent the defendant as inspector thereof; and that acting upon such instruction, plaintiffs at great cost, secured extra equipment and material and made excavation for the construction of said piers below the said [12] elevation at which bedrock was shown upon the plans, and requested payment therefor as extra work, from the defendant, but that the defendant refused, and continues to refuse, to pay for such extra work, or to recognize the fact that such extra work has been ordered and authorized.

XVIII.

That when the plaintiffs discovered that bedrock along the said stream over which the Kirkland Creek Bridge was to be constructed, was not at the elevation shown on the plans, the plaintiffs had made excavation from the ground line down to the water-level at which point cylinders were to be installed; and that by reason of the refusal of the defendant to comply with the terms of its said contract and authorize plaintiffs to continue said excavations, the work was delayed until the winter

rains; whereby the excavation already made by plaintiffs was filled up, and plaintiffs were compelled to re-excavate the earth under more difficult conditions and at a greatly increased cost; whereby plaintiffs were greatly damaged, all as more particularly hereinafter specified.

XIX.

That by reason of the neglect and failure of the defendant to authorize the plaintiffs to proceed with the construction of the said piers, in connection with the said Kirkland Creek Bridge, and make excavation and install piers, the plaintiffs were unable to proceed and complete the superstructure of said bridge, and were compelled to put up temporary superstructure over said creek; whereby the plaintiffs could convey their equipment and machinery across the said creek and pour cement upon the abutment on the south side of said bridge; whereby the plaintiffs were put to great extra expense, all as hereinafter more particularly specified. [13]

XX.

That the gravel to be used by the plaintiffs in connection with the work on said Kirkland Creek Bridge was exposed during the summer months of 1924, in the bed of the said Kirkland Creek, and was available for use by the plaintiffs; and that the delay caused by the defendant in failing to perform its part of the contract for the construction of said work as hereinbefore more particularly specified, the plaintiffs were prevented from using said gravel until the fall and winter rains, and said

rains brought down mud and silt covering the said gravel, and thereby making it unusable; whereby the plaintiffs were compelled to secure gravel and sand from other sources at a greatly increased cost; and that by reason thereof, the plaintiffs were greatly damaged, all as hereinafter more particularly specified.

XXI.

That the plaintiffs in writing, on the 31st day of December, 1924, offered to submit their foregoing claims against the defendant to arbitration, and that the defendant in writing, on the 3d day of January, 1925, refused to arbitrate the said claims of the plaintiffs.

XXII.

That the December estimate, under the said contract of May 27th, 1924, for payment due the plaintiffs from the defendant, amounted to Four Thousand Four Hundred and Sixty Dollars and Ninety-three Cents ($4,460.93); and that the said estimate was prepared by the defendant and by it approved; and that notwithstanding the fact that the said sum of Four Thousand Four Hundred and Sixty Dollars and Ninety-three Cents ($4,460.93) was due, owing, and unpaid from the defendant to the plaintiffs under said contract, the defendant failed, refused and neglected to make any of said payments, and conspired with various creditors [14] of the plaintiffs to have the said creditors of plaintiffs, sue the plaintiffs and attach the said money in the defendant's hands.

That acting under such conspiracy, and at the suggestion of the said defendant, L. J. Haselfeld, filed on the 19th day of December, 1924, in the Superior Court of the State of Arizona, in and for the county of Yavapai, a civil action against the plaintiffs for goods, wares and merchandise, amounting to the sum of Two Thousand Three Hundred and Eight Dollars and Eighty-eight Cents ($2,308.88); and thereafter attached the moneys belonging to the plaintiffs and in the hands of the defendant.

That before the said money was so attached, the plaintiffs had presented a draft on the defendant to the Phoenix National Bank of Phoenix, Arizona, to provide money to cover the pay-roll of the laborers and workmen employed by plaintiffs upon the said project in the construction of work done under said contract; and that the defendant refused to honor or pay the said draft upon presentation; and that by reason thereof, the plaintiffs did not have sufficient money to pay the said laborers and workmen, or to pay the claims for material and goods supplied to plaintiffs in connection with the construction of the said bridge.

That such action on the part of the defendant has made it impossible for the plaintiffs to proceed with the prosecution of the work provided for in said contract; and that the refusal of the defendant to pay for the extra work herein mentioned and already done by plaintiffs, has made it impossible for the plaintiffs to further prosecute said work.

XXIII.

That by reason of the neglect and refusal of the defendant to pay plaintiffs for work done under said contract, the plaintiffs have been unable to pay for material supplied them [15] for the execution of the said work, or for labor done thereon; whereby the plaintiffs' credit and good name in the State of Arizona has been greatly injured and impaired; and the plaintiffs have been greatly damaged, all as hereinafter more particularly specified.

XXIV.

That the acts and conduct on the part of the defendant more particularly hereinbefore specified, constitute a breach of the said contract, and a violation of the obligations by it assumed under the said contract with the plaintiffs of date May 27th, 1924.

That prior to the bringing of this suit the plaintiffs notified the defendant in writing that the said acts and conduct on the part of said defendants, constituted a breach of said contract; and that such breach had occasioned great damage and loss to the plaintiffs, in the sum hereinafter more particularly specified.

XXV.

That on the 9th day of December, 1924, and on the 3d day of January, 1925, the defendant notified the plaintiffs that they considered the said contract terminated, and of no force and effect, said notice being in writing.

XXVI.

That the plaintiffs have done and performed all

of the said labor and furnished certain goods, wares and merchandise to the defendant, at the special instance and request of the defendant, in the construction of the work hereinbefore specified, in connection with the said Kirkland Creek Bridge, and the said Federal Aid Project, of the reasonable value of Fifty-seven Thousand Eight Hundred Dollars and Thirty-nine Cents ($57,800.39), and that of said sum the defendant has paid the plaintiffs the sum of Sixteen Thousand Two Hundred and Ninety-five Dollars and Seventeen Cents ($16,295.-17); and there still [16] remains due, owing and unpaid from the defendant to the plaintiffs for the said labor, goods, wares and merchandise, and work done and performed, the sum of Forty-one Thousand Five Hundred and Five Dollars and Twenty-two Cents ($41,505.22).

XXVII.

That by reason of the acts *of* conduct on the part of the defendant hereinbefore alleged, and failure to perform the obligations by it assumed under the said contract of May 27th, 1924, and by its said breach thereof, the plaintiffs have been damaged in the sum of Twenty Thousand Dollars ($20,000.-00).

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of Sixty-one Thousand Five Hundred and Five Dollars and Twenty-two Cents ($61,505.22); and for the costs

of suit herein; and for such other and further relief as the Court may seem just and proper.

CROUCH & SANDERS,
Solicitors for the Plaintiffs.

State of California,
County of San Diego,—ss.

L. deWaard, being first duly sworn, deposes and says:

I am one of the plaintiffs in the foregoing entitled action and know the contents of the complaint to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true.

L. DEWAARD.

Subscribed and sworn to before me this 15th day of January, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California. [17]

EXHIBIT "A."

SUB-CONTRACT.

THIS AGREEMENT, made this 27th day of May, 1924, by and between the PHOENIX-TEMPE STONE COMPANY, an Arizona corporation, hereinafter called the party of the first part, and L. deWaard, H. deWaard, and L. de-

Waard, Jr., a copartnership doing business under the firm name and style of DEWAARD AND SONS, of San Diego, California, hereinafter called the party of the second part;

WITNESSETH:

That whereas, the party of the first part has entered into a contract with the State Engineer of the State of Arizona for the construction of a portion of the Prescott-Phoenix Highway, known as Federal Aid Project Number 72–A, said work being fully described in the specifications therefor issued by the State Engineer, and in the said contract between the party of the first part and said State Engineer; and

WHEREAS, the party of the first part is desirous of subletting a portion of said work hereinafter described, and the said party of the second part is desirous of sub-contracting said portion of said work upon the terms and conditions hereinafter stated;

NOW, THEREFORE, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows, to wit:

1. Party of the first part sublets to the party of the second part, and the party of the second part does sub-contract from the party of the first part all of the following items on said work as designated upon the plans and specifications prepared for said work by the said State Engineer, and the party of the second part covenants and agrees to do all of the said work hereby sublet at the following unit prices, to-wit:

The items of said work hereby sub-contracted and agreed to be done and performed by party of the second part, and the [18] price at which said work is agreed to be done are as follows:

1807 cubic yards excavation for structures, .85 per cubic yard.

607 cubic yards Class A Concrete, 16.15 per cubic yard.

191 cubic yards Class B Concrete, 15.30 per cubic yard.

184 cubic yards Class C Concrete, 13.60 per cubic yard.

225 cubic yards Rubble Masonry, 8.50 per cubic yard.

3 Cattle Guards, 106.25 each.

525 Linear feet Guard Fence, 0.85 per linear ft.

658 Linear feet 24 inch pipe, haul and place, 0.59½ per linear ft.

390 Linear feet 30 inch pipe, haul and place, 0.68 per linear ft.

284 Linear feet 36 inch pipe, haul and place, 0.85 per linear ft.

40530 lbs. steel, haul, place and bend, 0.04¼ per lb.

325 cubic yards excavation for structures, 0.85 per cubic yard.

90 cubic yards backfill excavation, 0.85 per cubic yard.

532 cubic yards Class A Concrete, 21.25 per cubic yard.

20 cubic yards Class B Concrete, 17.00 per cubic yard.

140 linear feet steel Cylinders, 34.00 per linear ft.
66242 lbs. steel, haul, place and bend, 0.04¼ per lb.
195 cubic yards rock backfill, 2.12½ per cubic yard.
50 cubic yards Riprap, 2.55 per cubic yard.

Any extra work required to be done by the State Engineer in connection with the above, under the terms of the contract between party of the first part and the State Engineer shall be paid for on the basis of cost plus ten per cent, on the same basis as is provided in the specifications of the State Engineer.

It is understood and agreed that the above prices include furnishing of material and labor to put the above mentioned items in place according to the plans and specifications of the State Engineer, and all work incidental thereto, excepting the furnishing of material, which is agreed to be furnished by the State under the contract between party of the first part and the State Engineer.

2. It is expressly understood and agreed that the quantity of work to be done hereunder, as shown on the plans and specifications of said State Engineer, and as shown herein, are subject to change and modification by the State Engineer, and the party of the second part shall do and perform all of said work and improvements as may be required by said State Engineer at the prices hereinbefore quoted, whether the quantities of said work may be increased or diminished, and the party of the second part shall be paid for [19] said work and improvements only according to the estimates of

said State Engineer. The party of the second part, however, hereby agrees that it will have no negotiations with the State Engineer; directly, except such negotiations as may be held and can be held in the field in arranging the work to be done under the terms of this contract. All other negotiations shall be through the party of the first part.

3. The party of the second part further covenants, promises and agrees that it will properly and in a workmanlike manner do all of the work aforesaid according to the said plans, specifications and contract with the State Engineer, and to the satisfaction and approval of the said State Engineer; that it will begin the work of construction not later than June 2, 1924;

That if at any time said work or any part thereof, are not executed or being executed in a sound and workmanlike manner, and in all respects in strict conformity with the specifications therefor, and to the satisfaction of party of the first part, party of the first part will notify the party of the second part in writing that such conditions exist, and in case party of the second part refuses to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or comply with any order it may receive to that effect, or in case the work, from the want of sufficient or proper workmen or materials is not proceeding with all the necessary dispatch, the party of the first part shall, after giving ten (10) days notice in writing to the party of the second part, its manager or agent, have full power without vitiating this contract, to take the

works wholly or in part out of the hands of party of the second part, to appropriate or use any or all materials, tools and appliances belonging to party of the second part, or provided by him for the work as may be suitable or acceptable, and to [20] engage or employ any other persons or workmen to do the work by contract or day labor, and procure all requisite materials and implements for the due execution and completion of the said works, and the cost and charges incurred by it in so doing shall be ascertained by the party of the first part and shall be paid for by the party of the second part or deducted from moneys due or to become due under this or any other contract with party of the first part.

4. Party of the second part covenants and agrees to carry liability insurance in an amount and in a company satisfactory to party of the first part, protecting them against accidents and injuries to their employees, and to furnish a copy of such liability insurance policy and any changes that may be made thereon from time to time to party of the first part.

5. Party of the second part further agrees to comply with all State and Federal laws and regulations in and about the doing of said work.

6. The party of the second part further covenants, promises and agrees to keep harmless and indemnify the party of the first part against all claims of persons or corporations for materials, property or services furnished for said work hereby sublet, and from all loss or damage to which

the party of the first part may be subjected in any manner or form or on account of injuries sustained by persons or property on account of the work done by party of the second part, its agents or servants hereunder.

7. It is further understood and agreed that if any dispute shall arise between the party of the second part and any other subcontractor from party of the first part, such dispute shall be settled by a board of arbitrators, one of whom shall be appointed by the party of the second part, one by the other sub-contractor, and the third by these two, and the decision shall be final. Any other [21] dispute arising over the performance of such work shall be similarly arbitrated or settled.

8. The party of the first part hereby covenants and agrees to pay for the doing of the aforesaid work at the prices hereinbefore set forth, less five per cent to be retained by said party of the first part until the completion of the work to be done by said second party, on the twentieth day of each calendar month for all work done during the preceding calendar month, unless the work done during the preceding calendar month shall not have been accepted by the State Engineer, in which case the party of the first part shall not be required to pay the party of the second part until the work is so accepted as required under the terms of this agreement.

9. It being further agreed by the party of the first part that in case the said party of the second part shall for any reason brought about by the act

of the said party of the first part, be held up or prevented from doing the work contracted to be done, by virtue of litigation, said party of the first part will pay to said party of the second part all damage occasioned to said party of the second part by virtue of its being unable to proceed with the work, such amount to be settled as is hereinbefore provided.

10. It is further understood and agreed that the party of the second part will furnish before beginning work under the subcontract to the party of the first part a bond or bonds executed by a surety company approved by party of the first part, guaranteeing the faithful performance on its part of the terms and conditions of this contract, and guaranteeing the payment of all bills incurred by party of the second part for material and labor, property or services furnished to party of the second part for the said work, or on account of or in connection therewith. Said bond shall be in the sum of not less than Forty-two Thousand One Hundred Seventy-six and 75/100 Dollars ($42,176.75); and it is further understood and agreed that [22] if at any time there shall be evidence of any unpaid bills incurred by party of the second part for material or labor or property or services furnished for said work, or in connection therewith, or any evidence of any claim against party of the second part for which party of the first part might be held liable and is entitled to be protected against by party of the second part, the party of the first part may withhold the payment of sufficient money due to party of the second

part to cover such material or labor bills or other liabilities.

The party of the second part covenants and agrees to complete the work herein provided for within the period of seven (7) months from the date of beginning, and at all times to proceed with said work at a rate of progress that will insure its completion within said seven (7) months' period.

IN WITNESS WHEREOF, said parties have hereto set their hands the day and year first above written.

PHOENIX-TEMPE STONE COMPANY.
By (Signed) E. P. CONWAY, President.
Party of First Part.
DeWAARD AND SONS.
By (Signed) L. DeWAARD,
Party of Second Part. [23]

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, De Waard and Sons, a copartnership, as principal, and Standard Accident Ins. Company, as surety, are jointly and severally bound unto the Phoenix-Tempe Stone Company, a corporation, in the sum of Forty-two Thousand One Hundred Seventy-six and 75/100 ($42,176.75) Dollars, lawful money of the United States of America, to be well and truly paid to the said Phoenix-Tempe Stone Company, for which payment well and truly to be made, we bind ourselves, our and each of our, heirs, successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that if the above bounden principal, De Waard and Sons, their heirs, successors and assigns, shall in all things and in all respects, stand to and abide by, well and truly keep, and faithfully perform, all of the covenants, conditions and agreements of a contract, hereto attached, made between said principal, as subcontractor, and the Phoenix-Tempe Stone Company, for the making of certain improvements and for the doing of certain work upon a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, all in compliance with the said Contract between said Phoenix-Tempe Stone Company and said principal, in the manner and form therein specified and shall promptly pay for all materials, property, labor, work and services furnished, done, or performed, upon or in connection with said improvements and work, or in the performance thereof at the time said payments became due, and shall keep harmless and indemnify said Phoenix-Tempe Stone Company against all claims for loss or damage on account of injuries sustained by persons or property, in or on account of the performance of said work, then this obligation shall be null and void. Otherwise it shall remain in full force and virtue. [24]

IN WITNESS WHEREOF, we have caused these presents to be executed this 27th day of May, 1924.

(Signed) de WAARD & SONS.
By L. de WAARD.
STANDARD ACCIDENT INSURANCE COMPANY,
By (Signed) LASSER H. GORNETZKY,
Atty-in-fact.
Attest: M. KINGSBURY, (Seal)
Atty.-in-fact.

[Endorsed]: Filed Jan. 19, 1925. [25]

[Title of Court and Cause.]

AMENDMENT AND SUPPLEMENT TO COMPLAINT.

Come now the plaintiffs herein, and leave of Court being first duly had and obtained, amend Paragraphs XXVI and XXVII of their complaint herein to read as follows, to wit:

XXVI.

That prior to the taking over of the said work by the defendant as aforesaid, the plaintiffs expended for labor, materials and supplies used, in, upon, and about the said work, the sum of Thirty-three Thousand Eight Hundred and Twenty-six Dollars and Seventy Cents ($36,826.70). That the reasonable rental value of plaintiffs' machinery, tools and equipment used by the plaintiffs upon the said work was Three Thousand Six Hundred Dollars ($3,-

600.00). That a fair and reasonable profit to be allowed the plaintiffs for the work by them done, as aforesaid, is Three Thousand Seven Hundred and Forty-three Dollars and Eighty-seven Cents ($3,743.87), being ten per cent (10%) of the amounts aforesaid, making the reasonable value of the work, labor and materials furnished and performed by the plaintiffs the sum of Forty-one Thousand One Hundred Seventy-one Dollars and Fifty-seven Cents ($41,171.57), [26] of which the plaintiffs have been paid the sum of Sixteen Thousand Five Hundred and Twenty-eight Dollars and Fifteen Cents ($16,528.15), leaving a balance of Twenty-four Thousand Six Hundred and Forty-three Dollars and Forty-two Cents ($24,643.42), upon which there is accrued interest amounting to Two Thousand Two Hundred Twenty-eight Dollars and Seventeen Cents ($2,228.17), making a sum total of Twenty-six Thousand Eight Hundred Seventy-one Dollars and Fifty-nine Cents ($26,871.59).

SUPPLEMENT TO COMPLAINT.

And like leave of Court being first duly had and obtained, plaintiffs by way of supplement to their complaint, allege:

1.

That the reasonable rental value of plaintiffs' machinery, tools and equipment used by defendant in the completion of the said work is the sum of Three housand Dollars ($3,000.00), upon which there is accrued interest in the amount of One Hundred Forty-five Dollars and Thirty-seven Cents

($145.37), making a sum total of Three Thousand One Hundred Forty-five Dollars and Seventy-eight Cents ($3,145.78).

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of Thirty Thousand and Seventeen Dollars and Thirty-seven Cents ($30,017.-37), and for costs of suit.

CROUCH & SANDERS,
Attorneys for Plaintiffs. [27]

State of Arizona,
County of Maricopa,—ss.

L. De Waard, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the above and foregoing amendments to and supplement to complaint herein, and that the facts therein stated are true.

L. DeWAARD.

Subscribed and sworn to before me this 15th day of April, 1926.

[Seal] A. C. JENKINS,
Notary Public in and for the County of Maricopa and State of Arizona.

My commission expires Oct. 24, 1926.

[Endorsed]: Filed Apr. 16, 1926. [28]

[Title of Court and Cause.]

DEMURRER.

Comes now the Phoenix-Tempe Stone Company, a corporation, defendant in the above-entitled action,

and demurs to plaintiffs' complaint herein upon the following grounds:

I.

That several alleged and attempted causes of action are improperly united and commingled in a single count.

II.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that said action be dismissed and that it have judgment for its costs herein incurred.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Attorneys for Defendant. [29]

[Title of Court and Cause.]

ANSWER.

Comes now the Phoenix-Tempe Stone Company, a corporation, defendant in the above-entitled action, and without waiving its demurrer to said plaintiff's complaint herein filed, but expressly relying thereon, and provided only that said demurrer be overruled, further answers said complaint:

I.

That it admits the corporate capacity and place of residence of said defendant, and admits that on or about the 27th day of May, 1924, said plaintiffs and the defendant entered into a written contract wherein and whereby the said plaintiff undertook

and agreed to construct a portion of the Prescott-Phoenix Highway, known as "Federal Aid Project No. 72A," and that said work was described in plans and specifications attached to said contract and made a part thereof, and that the copy of said contract attached to said complaint is substantially correct; that thereafter said plaintiff commenced the performance of the work and labor provided to be done by said contract; admits that the plans attached to said contract showed a bridge structure known as "Kirkland Creek Bridge," and that as a part of said [30] plans there are lines showing ground and water and high water elevation, but denies that there is any indication upon said plans of the rock elevation line or contour, and alleges that the only evidence disclosed by said plans of the location of rock elevation in connection with said Kirkland Creek Bridge are three test pits, one near each end of said bridge and one at substantially the center thereof, and being about 80 feet apart; that the rock elevation is disclosed by these test pits and by no other mark, indication or line upon said plans; that the specifications above referred to relating to said bridge expressly provide that the contractor, the plaintiff herein, before subscribing thereto, has by careful examination satisfied himself as to the details of the plans, the nature of the work and the confirmation of the ground, and specifies that quantities shown on the plans, profiles and cross-sections are approximate only, and that the cylinders which rest upon the rock for the support of said bridge "shall be sunk to bedrock," and

that the basis of payment for cylinders shall be the unit price per lineal foot of cylinder named in the proposed schedule for cylinders complete in place; that none of said test pits were located at the points indicated for the placing of said cylinders, and that some of said cylinders were far removed from any such test pit; that neither said plans or specifications assume or undertake to furnish any guide or direction as to the location of said rock elevation excepting by means of said test pits; denies that at any time plaintiff discovered that the rock elevation or bedrock was at a place different from that shown upon said plans or that it became necessary to excavate to greater depth than said plans specified. Defendant admits, however, that it was notified by plaintiffs that the equipment which said plaintiffs then were employing in the performance [31] of said contract was insufficient to proceed with said work, and admits that plaintiffs claimed and demanded extra compensation for work performed in the construction of said cylinders, but denies that any work had been done in connection therewith which is not shown upon said plans and provided for by said specifications, and denies that plaintiffs were not fully informed by the plans and specifications concerning all work, excavation and material required by or employed in the construction of said piers and cylinders by the plaintiffs; admits that defendant informed plaintiffs that all work of construction of said piers and cylinders was to be paid for upon the unit price therefor named in said contract.

II.

Defendant denies that it has permitted other subcontractors under it engaged in execution of work in connection with said highway project to so execute their work or in any other manner or way hinder or interfere with the plaintiffs in the execution of the work provided for in their said subcontract.

III.

Denies that the ground line shown upon the said plans of said Kirkland Creek Bridge was incorrect or that any work, material or structure was required of plaintiffs by reason of any such incorrectness of ground line. Denies that the water line shown upon said plans for the construction of said Kirkland Creek Bridge was incorrect and alleges that it appears from the face of said plans that they were prepared on January 17, 1923, more than a year before the execution of said contract between plaintiffs and defendant, and that the lines upon said plans and the conditions disclosed thereby were accurate and correct as of that date; that plaintiffs had full and express notice of the long lapse of time between the preparation of said plans [32] and the time for the construction of work under their said contract. Defendant denies that there had been no rainfall or precipitation upon the watershed leading into said Kirkland Creek during said period which might affect the water line at the point of the construction of said bridge.

IV.

That defendant denies that any delay of plaintiffs or plaintiffs' work under said contract was

caused by any neglect or failure of defendant to comply with the terms or with any terms of said subcontract and allege that if the completion of the work of excavation for said piers was extended into the winter months of 1924 or at all, it was due to or on account of lack of labor, equipment or diligence on the part of plaintiffs.

V.

That defendant denies that after the plaintiffs had entered upon the execution of the work under said subcontract on or about September 15, 1924, or at any other time, a new or different set of plans for the construction of Kirkland Creek Bridge was substituted, offered or proposed by defendant, but alleges that a slight deviation in the construction of one certain detail was suggested, made and carried out by and with the consent, acquiescence and agreement of plaintiffs and full and complete compensation and remuneration agreed upon and performed therefor; denies that any revision or change in the original plans contemplated or required of plaintiffs that they tear down or reconstruct any portion of said bridge for which defendant refuses to pay or has not paid; defendant denies that under its contract with plaintiffs in connection with said highway it has failed or neglected to do or perform any work in connection with the construction of fills or abutments leading up to said bridge for the use or convenience of said plaintiffs. [33]

VI.

That defendant denies that in connection with

plaintiffs' work under said contract in People's Valley they were hindered or delayed by other subcontractors or contractors of defendant; denies that plaintiffs were required to or did build any cattle-guards for which they have not been fully paid; denies that defendant has ever refused to pay plaintiffs for any work done in connection with the construction of any such cattle-guards; denies that plaintiffs by reason of any change of plans or otherwise were required to recut steel to be used in connection with said work of construction for which they have not been fully paid; that defendant denies that a new or different type of culvert was required to be prepared by plaintiffs different from that provided by the plans and specifications, but in that connection allege that additional excavation was made for a certain culvert for which compensation was agreed upon between plaintiffs and defendant and for which plaintiffs were fully paid; denies that defendant refused to pay plaintiffs for any work done or material furnished in connection with excavations or other work in connection with the construction of guard rails and installing forms therefor at certain fords referred to in plaintiffs' complaint, but allege that all work and labor and material employed in connection with said construction was fully and completely paid for; denies that defendant refused to permit or interfered with the hauling by plaintiffs of their material or equipment over the highway under construction; denies that defendant compelled plaintiffs to haul their material over rough or temporary roads; denies that defend-

ant delayed due and prompt inspection for a period of four days or any other length of time of said abutments; denies that plaintiffs were in any way or at all delayed or retarded in the completion of said [34] abutments or the prosecution of their work on account of any act or duty required of defendant or devolving upon it to perform; denies that any failure of defendant to promptly inspect any work of construction done by plaintiffs under said contract caused or resulted in any loss or damage to said plaintiffs; denies that plaintiffs were prevented from using gravel found in the bed of said Kirkland Creek on account of any action required of defendant to be done in the terms of said contract or any obligation thereunder.

VII.

That defendant admits that the estimate for December for work performed by plaintiffs under said contract was withheld by defendant because it learned that said plaintiffs had failed and neglected to pay claims on account of material and services rendered to them in the execution of said contract by plaintiffs and for which this defendant thereupon became liable, but defendant denies that it contrived or conspired with various creditors or with any creditors to sue or otherwise embarrass plaintiffs or attach money in the hands of defendant.

VIII.

That defendant denies that it has done any act which constituted a breach of said contract or that it has failed or neglected in any respect to

carry out and perform all duties and obligations required of it to be done by the terms of said contract.

IX.

That defendant denies that plaintiffs have done and performed all labor and furnished goods, wares and merchandise to defendant at its special instance and request in the construction of the work required of it to be done under said contract or at all in connection with said Kirkland Creek Bridge or said [35] Federal Aid Project of the reasonable value of Fifty-seven Thousand Eight Hundred and 39/100 Dollars ($75,800.39) or any other sum for which said plaintiffs have not been fully paid.

X.

That defendant in answer to Paragraph XXV of said complaint alleges that in accordance with the provisions of section 3 of said contract, after due written notice thereof to plaintiffs that said plaintiffs were not proceeding with due diligence and dispatch as in said contract provided, and after ten days further failure after the receipt of said notice to proceed in the manner and with the dispatch provided in said contract, said defendant further notified plaintiffs that their contract in the premises was at an end.

XI.

That defendant denies each and every allegation contained in said complaint not hereinbefore expressly admitted.

WHEREFORE, defendant prays that said action be dismissed and that it have judgment for its costs herein incurred.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1925. [36]

[Title of Court and Cause.]

DEMURRER.

Comes now the Phoenix-Tempe Stone Company, a corporation, defendant in the above-entitled action, and demurs to plaintiff's [37] complaint herein upon the following grounds:

I.

That several alleged and attempted causes of action are improperly united and commingled in a single count.

II.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that said action be dismissed and that it have judgment for its costs herein incurred.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Attorneys for Defendant.

ANSWER.

Comes now the Phoenix-Tempe Stone Company, a corporation, defendant in the above-entitled action, and without waiving its demurrer to said plaintiff's complaint herein filed, but expressly relying thereon, and provided only that said demurrer be overruled, further answers said complaint:

I.

That it admits the corporate capacity and place of residence of said defendant, and admits that on or about the 27th day of May, 1924, said plaintiffs and the defendant entered into a written contract wherein and whereby the said plaintiff undertook and agreed to construct a portion of the Prescott-Phoenix Highway, known as "Federal Aid Project No. 72–A," and that said work was described in plans and specifications attached to said contract and made a part thereof, and that the copy of said contract attached to said complaint is substantially correct; that thereafter said plaintiff commenced the performance of the work and labor provided to be done by said contract; admits that the plans attached to said contract showed a bridge structure known as "Kirkland Creek Bridge," and that as a part of said plans there are lines showing ground and water and high water [38] elevation, but denies that there is any indication upon said plans of the rock elevation line or contour, and alleges that the only evidence disclosed by said plans of the location

of rock elevation in connection with said Kirkland Creek Bridge are three test pits, one near each end of said bridge and one at substantially the center thereof, and being about 80 feet apart; that the rock elevation is disclosed by these test pits and by no other mark, indication or line upon said plans; that the specifications above referred to relating to said bridge expressly provide that the contractor, the plaintiff herein, before subscribing thereto, has by careful examination satisfied himself as to the details of the plans, the nature of the work and the confirmation of the ground, and specifies that quantities shown on the plans, profiles and cross-sections are approximate only, and that the cyliders which rest upon the rock for the support of said bridge "shall be sunk to bedrock," and that the basis of payment for cylinders shall be the unit price per lineal foot of cylinder named in the proposed schedule for cylinders complete in place; that none of said test pits were located at the points indicated for the placing of said cylinders, and that some of said cylinders were far removed from any such test pit; that neither said plans or specifications assume or undertake to furnish any guide or direction as to the location of said rock elevation excepting by means of said test pits; denies that at any time plaintiff discovered that the rock elevation or bedrock was at a place different from that shown upon said plans or that it became necessary to excavate to a greater depth than said plans specified. Defendant admits, however, that

it was notified by plaintiffs that the equipment which said plaintiffs then were employing in the performance of said contract was insufficient to proceed with said work, and admits that plaintiffs claimed and demanded extra [39] compensation for work performed in the construction of said cylinders, but denies that any work had been done in connection therewith which is now shown upon said plans and provided for by said specifications, and denies that plaintiffs were not fully informed by the plans and specifications concerning all work, excavation and material required by or employed in the construction of said piers and cylinders by the plaintiffs; admits that defendant informed plaintiffs that all work of construction of said piers and cylinders was to be paid for upon the unit price therefor named in said contract.

II.

Defendant denies that it has permitted other subcontractors under it engaged in execution of work in connection with said highway project to so execute their work or in any other manner or way hinder or interfere with the plaintiffs in the execution of the work provided for in their said subcontract.

III.

Denies that the ground line shown upon the said plans of said Kirkland Creek Bridge was incorrect or that any work, material or structure was required of plaintiffs by reason of any such incorrectness of ground line. Denies that the water

line shown upon said plans for the construction of said Kirkland Creek Bridge was incorrect and alleges that it appears from the face of said plans that they were prepared on January 17, 1923, more than a year before the execution of said contract between plaintiffs and defendant, and that the lines upon said plans and the conditions disclosed thereby were accurate and correct as of that date; that plaintiffs had full and express notice of the long lapse of time between the preparation of said plans and the time for the construction of work under their said contract. Defendant denies that there had been no rainfall or precipitation upon the watershed leading into said Kirkland [40] Creek during said period which might affect the water line at the point of the construction of said bridge.

IV.

That defendant denies that any delay of plaintiffs or plaintiffs' work under said contract was caused by any neglect or failure of defendant to comply with the terms or with any terms of said subcontract, and allege that if the completion of the work of excavation for said piers was extended into the winter months of 1924 or at all, it was due to or on account of lack of labor, equipment or diligence on the part of plaintiffs.

V.

That defendant denies that after the plaintiffs had entered upon the execution of the work under said subcontract on or about September 15, 1924,

or at any other time, a new or different set of plans for the construction of Kirkland Creek Bridge was substituted, offered or proposed by defendant, but alleges that a slight deviation in the construction of one certain detail was suggested, made and carried out by and with the consent, acquiescence and agreement of plaintiffs and full and complete compensation and remuneration agreed upon and performed therefor; denies that any revision or change in the original plans contemplated or required of plaintiffs that they tear down or reconstruct any portion of said bridge for which defendant refuses to pay or has not paid; defendant denies that under its contract with plaintiffs in connection with said highway it has failed or neglected to do or perform any work in connection with the construction of fills or abutments leading up to said bridge for the use or convenience of said plaintiffs.

VI.

That defendant denies that in connection with plaintiffs' work under said contract in People's Valley they were hindered or delayed by other subcontractors or contractors of defendant; [41] denies that plaintiffs were required to or did build any cattle-guards for which they have not been fully paid; denies that defendant has ever refused to pay plaintiffs for any work done in connection with the construction of any such cattle-guards; denies that plaintiffs by reason of any change of plans or otherwise were required to recut steel to be used in connection with said work

of construction for which they have not been fully paid; that defendant denies that a new or different type of culvert was required to be prepared by plaintiffs different from that provided by the plans and specifications, but in that connection allege that additional excavation was made for a certain culvert for which compensation was agreed upon between plaintiffs and defendant and for which plaintiffs were fully paid; denies that defendant refused to pay plaintiffs for any work done or material furnished in connection with excavations or other work in connection with the construction of guard-rails and installing forms therefor at certain fords referred to in plaintiffs' complaint, but allege that all work and labor and material employed in connection with said construction was fully and completely paid for; denies that defendant refused to permit or interfered with the hauling by plaintiffs of their material or equipment over the highway under construction; denies that defendant compelled plaintiffs to haul their material over rough or temporary roads; denies that defendant delayed due and prompt inspection for a period of four days or any other length of time of said abutments; denies that plaintiffs were in any way or at all delayed or retarded in the completion of said abutments or the prosecution of their work on account of any act or duty required of defendant or devolving upon it to perform; denies that any failure of defendant to promptly inspect any work of construction done by plaintiffs under said con-

tract caused or resulted in any loss or damage to said plaintiffs; [42] denies that plaintiffs were prevented from using gravel found in the bed of said Kirkland Creek on account of any action required of defendant to be done in the terms of said contract or any obligation thereunder.

VII.

That defendant admits that the estimate for December for work performed by plaintiffs under said contract was withheld by defendant because it learned that said plaintiffs had failed and neglected to pay claims on account of material and services rendered to them in the execution of said contract by plaintiffs and for which this defendant thereupon became liable, but defendant denies that it contrived or conspired with various creditors or with any creditors to sue or otherwise embarrass plaintiffs or attach money in the hands of defendant.

VIII.

That defendant denies that it has done any act which constituted a breach of said contract or that it has failed or neglected in any respect to carry out and perform all duties and obligations required of it to be done by the terms of said contract.

IX.

That defendant denies that plaintiffs have done and performed all labor and furnished goods, wares and merchandise to defendant at its special instance and request in the construction of the work required of it to be done under said contract

or at all in connection with said Kirkland Creek Bridge or said Federal Aid Project of the reasonable value of Fifty-seven Thousand Eight Hundred and 39/100 Dollars ($57,800.39) or any other sum for which said plaintiffs have not been fully paid.

X.

That defendant in answer to Paragraph XXV of said complaint alleges that in accordance with the provisions of section [43] 3 of said contract, after due written notice thereof to plaintiffs that said plaintiffs were not proceeding with due diligence and dispatch as in said contract provided, and after ten days further failure after the receipt of said notice to proceed in the manner and with the dispatch provided in said contract, said defendant further notified plaintiffs that they would take over and complete said work.

XI.

That defendant denies each and every allegation contained in said complaint not hereinbefore expressly admitted.

WHEREFORE, defendant prays that said action be dismissed and that it have judgment for its costs herein incurred.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Attorneys for Defendant.

CROSS-COMPLAINT.

The Phoenix-Tempe Stone Company having heretofore answered the complaint herein does

now and herewith tender its cross-complaint to this Court as against said DeWaard & Sons and the other above-named cross-defendants in further disclosure of and relating to the same subject matter upon which said complaint is alleged to be based, and respectfully shows to the Court:

I.

That said cross-complaint is a corporation organized, existing and doing business under the laws of the State of Arizona, [44] having its office and principal place of business at Phoenix, Arizona.

That cross-complainant is informed and believes and upon such information alleges that said cross-defendants, L. DeWaard, H. DeWaard and L. DeWaard, Jr., are copartners, and doing business under the firm name and style of DeWaard & Sons. That none of said copartners are residents of or have any place of business in the State of Arizona, but are residents of and do business in the city of San Diego, in the State of California.

That Standard Accident Insurance Company of Detroit is a corporation duly organized, existing and doing business under the laws of the State of Michigan and is and was at all times hereinafter mentioned a surety company authorized to become surety upon bonds in the State of Arizona.

That Benson Lumber Company is as cross-complainant is informed and believes and therefore alleges, a corporation organized under the laws of the State of California, having its office and prin-

cipal place of business in the city of San Diego, California.

That cross-defendants, Pratt-Gilbert Company, Guardian Trust Company, Union Oil Company of Arizona, Arizona Grocery Company, Motor Supply Company and McGrath Mule Company are all and each of them is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Arizona, each thereof having its office and principal place of business in the County of Maricopa, Arizona.

That cross-defendants, Bashford-Burmister Company and Head Lumber Company, are both and each of them is a corporation organized, existing and doing business under the laws of the State of Arizona and each has its office and principal place of business at the city of Prescott, State of Arizona.

That L. J. Haselfeld is a resident of the city of Prescott, Arizona. [45]

That Jules Vermeesch, Redmond Toohey and Ezra W. Thayer, are individuals doing business and residing in Maricopa County, Arizona.

That Spencer Burke is a resident of Yavapai County, Arizona.

II.

That heretofore, on or about the 17th day of May, 1924, said cross-complainant, Phoenix-Tempe Stone Company, contracted with the State Engineer of the State of Arizona as such Engineer and not individually, but acting in accordance with and under the provisions of the laws of the State

of Arizona, for the construction of a certain highway known as Prescott-Phoenix Highway, Federal Aid Project No. 72–A.

That said cross-complainant was required by the terms of said contract to fully finish and complete the work of construction provided for therein on or before the 31st day of December, 1924.

That as a condition precedent to said contract and coincident to the execution thereof, said cross-complainant executed and delivered to said engineer of the State of Arizona, two certain bonds on each of which said bonds said Phoenix-Tempe Stone Company was principal and the Maryland Casualty Company, was surety; that by the terms of one of said bonds said Phoenix-Tempe Stone Company became bound to fully perform, execute and complete the work of construction provided for in said contract with said State Engineer, and by the terms and conditions of the other of said bonds said Phoenix-Tempe Stone Company became bound by the following provision and terms of said bond, to wit:

> "NOW THEREFORE, if the said contractor to whom said contract was awarded, or any assigns of his, or any sub-contractor under said contract, fails to pay all moneys due or to become due for or on account of any materials or property so furnished in the said work or improvement, or the performance thereof, or [46] for any work, labor or services done thereon or furnished therefor, the

said surety will pay the same to an amount not exceeding the sum hereinabove specified.

"This bond shall inure to the benefit of any and all persons, companies, or corporations who may have claims against such contractors, or any sub-contractor under said contract, for or on account of labor or services performed, or material or property furnished for, or used in the said work or improvement, or the performance thereof, as provided by the Laws of Arizona."

That said contract and said bonds were delivered to the State Engineer of Arizona and filed in his office.

III.

That thereafter on or about the 27th day of May, 1924, said cross-defendant, DeWaard & Sons, entered into a certain written contract with said cross-complainant for the construction of a portion of said highway, such portion being particularly specified in said contract, a copy of which contract is hereto attached and made a part hereof as though written at full herein. That coincident with the execution and delivery of said last-mentioned contract and as a condition precedent thereto, said DeWaard & Sons as principal, and cross-defendant, Standard Accident Insurance Company, as surety, executed and delivered a certain bond to said cross-complainant wherein and whereby the parties thereto became bound to the Phoenix-Tempe Stone Company by the terms and conditions thereof to fully keep and

perform all of the covenants, conditions and agreements of said contract between DeWaard & Sons and Phoenix-Tempe Stone Company, for the making of certain improvement and for the doing of that certain work upon a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, all in compliance with the said contract in the manner and form therein specified and to promptly pay for all materials, property, labor, work and services furnished, done or performed upon or in connection with said improvement and work or in the performance thereof at the time said payments [47] became due. That a copy of said bond is hereto attached and made a part hereof.

That thereupon said subcontractor, DeWaard & Sons, entered upon the performance and execution of said contract.

IV.

That by the terms of said subcontract, DeWaard & Sons were required to complete the work therein provided for on or before seven months from and after the commencement of the execution of said contract and not later than seven months from and after the 2d day of June, 1924, and were further required to at all times furnish and provide for the performance and execution thereof sufficient and proper workmen and material to carry on the work with necessary dispatch and that in default thereof, said Phoenix-Tempe Stone Company, might and would after ten days' notice in writing to said subcontractor, have full power to take the

works out of the hands of said subcontractor and perform and complete the same. That the said DeWaard & Sons wholly failed, neglected and refused to provide sufficient or proper workmen or material for the necessary dispatch and progress of said work to furnish adequate equipment to carry on the same. That said Phoenix-Tempe Stone Company in accordance with the provisions of said construction contract and acting under the authority therein given, did, on or about the 3d day of January, 1925, duly give to said DeWaard & Sons notice in writing of their said failure to provide necessary equipment, material or workmen for the adequate and necessary dispatch of said work. That more than ten days thereafter the said DeWaard & Sons still continuing and persisting in their failure to furnish or supply the necessary, sufficient or requisite workmen or equipment for the necessary dispatch and progress of said work, said Phoenix-Tempe Stone Company, took over and took possession of said work and thereupon and thenceforth [48] proceeded to and did carry out, finish and complete the same in accordance with the plans and specifications therefor and under the direction, with the approval and to the satisfaction of the State Engineer.

That in so completing and carrying out the work so taken over by it and for which said DeWaard & Sons had contracted and bound itself to perform, the said Phoenix-Tempe Stone Company necessarily expended and became charged with the sum of

Thirty-one Thousand Eight Hundred Fifty-two and 80/100 ($31,852.80) Dollars.

That the materials furnished and the labor performed in connection therewith, were and are of the reasonable value of said sum.

That said cross-complainant has been reimbursed by payments from the State of Arizona on account of its execution of said contract, in the sum of Twenty-six Thousand Nine Hundred Sixty and 39/100 ($26,960.39) Dollars.

That said cross-complainant further paid out as it was required to do under the terms of its said contract with the State Engineer, the sum of One Thousand Five Hundred Sixty-eight and 73/100 ($1,568.73) Dollars, on account of labor performed for and at the request of said DeWaard & Sons in the partial performance of their contract and for which they neglected and refused to pay. That said amount was a just and reasonable charge for the labor so performed.

V.

That said cross-defendant, Pratt-Gilbert Company, a corporation, Bashford-Burmister Company, a corporation, Guardian Trust Company, a corporation, Union Oil Company of Arizona, a corporation, Arizona Grocery Company, a corporation, Motor Supply Company, a corporation, Western Pipe & Steel Company, a corporation, Head Lumber Company, a corporation, McGrath Mule [49] Company, a corporation, Benson Lumber Company, a corporation, L. J. Haselfeld, Jules Vermeesch, Redmond Toohey, Ezra W. Thayer and

Spencer Burke, have or claim to have furnished materials, property, labor, work and services done or performed upon or in connection with said work and improvement said improvements and work or in the performance thereof at the instance and request and for the benefit of said DeWaard & Sons.

That cross-complainant is without any knowledge or information or belief sufficient to enable it to determine which, if any, of said claims are valid, legal and existing claims, or which, if any, of said claims constitute liabilities against this cross-complainant under its contract with the State Engineer and its bond for the performance thereof, or any of them, or at all, and on account of said lack of knowledge, information or belief, and basing its allegations on that ground alone, cross-complainant, alleges that said claims of said cross-defendant claimants are and each of them is without right and constitute no liability against said cross-complainant.

WHEREFORE, cross-complainant prays:

1. That all of said cross-defendant claimants be summoned and required to appear herein and set forth and establish what, if any, claim they have for which said cross-complainant is liable under its said contract;

2. That it have judgment against said cross-defendants, DeWaard & Sons, and Standard Accident Insurance Company for the full amount of Six Thousand Four Hundred Sixty-one and 14/100 ($6,461.14) Dollars expended by it in the completion and performance of the said contract of DeWaard & Sons and in payment of said labor claims

incurred by said DeWaard & Sons, with interest thereon at six per cent per annum, together with such further sums as said cross-complainant may be found liable for, if any, to the said cross-complainant claimants for material, [50] labor or property furnished to the said DeWaard & Sons in the performance of their contract, for the costs of this action and for such other and further relief as may be just and equitable in the premises.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,
Attorneys for Cross-complainant. [51]

SUB-CONTRACT.

THIS AGREEMENT, made this 27th day of May, 1924, by and between the PHOENIX-TEMPE STONE COMPANY, an Arizona Corporation, hereinafter called the party of the first part, and L. de Waard, H. de Waard and L. de Waard, Jr., a copartnership doing business under the firm name and style of DE WAARD AND SONS, of San Diego, California, hereinafter called the party of the second part;

WITNESSETH:

That whereas, the party of the first part has entered into a contract with the State Engineer of the State of Arizona for the construction of a portion of the Prescott-Phoenix Highway, known as Federal Aid Project Number 72-A, said work being fully described in the specifications therefor issued by the State Engineer, and in the said contract between the party of the first part and said State Engineer; and

WHEREAS, the party of the first part is desirous of subletting a portion of said work hereinafter described, and the said party of the second part is desirous of sub-contracting said portion of said work upon the terms and conditions hereinafter stated;

NOW THEREFORE, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows, to-wit:

1. Party of the first part sublets to the party of the second part, and the party of the second part does sub-contract from the party of the first part all of the following items on said work as designated upon the plans and specifications prepared for said work by the said State Engineer, and the party of the second part covenants and agrees to do all of the said work hereby sublet at the following unit prices, to-wit:

The items of said work hereby sub-contracted and agreed to be done and performed by party of the second part, and the [52] price at which said work is agreed to be done are as follows:

1807 cubic yards excavation for structures, .85 per cubic yard.

607 cubic yards Class A Concrete, 16.15 per cubic yard.

191 cubic yards Class B Concrete, 15.30 per cubic yard.

184 cubic yards Class C Concrete, 13.60 per cubic yard.

225 cubic yards Rubble Masonry, 8.50 per cubic yard.

3 Cattle Guards, 106.25 each.
525 Linear feet Guard Fence, 0.85 per linear ft.
658 Linear feet 24 inch pipe, haul and place, 0.59½ per linear ft.
390 Linear feet 30 inch pipe, haul and place, 0.68 per linear ft.
284 Linear feet 36 inch pipe, haul and place, 0.85 per linear ft.
40530 lbs. steel, haul, place and bend, 0.04¼ per lb.
325 cubic yards excavation for structures 0.85 per cubic yard.
90 cubic yards backfill excavation, 0.85 per cubic yard.
532 cubic yards Class A Concrete, 21.25 per cubic yard.
20 cubic yards Class B Concrete, 17.00 per cubic yard.
140 linear feet steel Cylinders, 34.00 per linear ft.
66242 lbs. steel, haul, place and bend, 0.04¼ per lb.
195 cubic yards rock backfill, 2.12½ per cubic yard.
50 cubic yards Riprap, 2.55 per cubic yard.

Any extra work required to be done by the State Engineer in connection with the above, under the terms of the contract between the party of the first part and the State Engineer shall be paid for on the basis of cost plus ten per cent, on the same basis as is provided in the specifications of the State Engineer.

It is understood and agreed that the above prices include furnishing of material and labor to put the above mentioned items in place according to the plans and specifications of the State Engineer, and

all work incidental thereto, excepting the furnishing of material, which is agreed to be furnished by the State under the contract between the party of the first part and the State Engineer.

2. It is expressly understood and agreed that the quantity of work to be done hereunder, as shown on the plans and specifications of said State Engineer, and as shown herein, are subject to change and modification by the State Engineer, and the party of the second part shall do and perform all of said work and improvements as may be required by said State Engineer at the prices hereinbefore quoted, whether the quantities of said work may be increased or diminished, and the party of the second [53] part shall be paid for said work and improvements only according to the estimates of said State Engineer. The party of the second part, however, hereby agrees that it will have no negotiations with the State Engineer; directly, except such negotiations as may be held and can be held in the field in arranging the work to be done under the terms of this contract. All other negotiations shall be through the party of the first part.

3. The party of the second part further covenants, promises and agrees that it will properly and in a workmanlike manner do all of the work aforesaid according to the said plans, specifications and contract with the State Engineer, and to the satisfaction and approval of the said State Engineer; that it will begin the work of construction not later than June 2, 1924.

That if at any time said work or any part thereof, are not executed or being executed in a sound and workmanlike manner, and in all respects in strict conformity with the specifications therefor, and to the satisfaction of party of the first part, party of the first part will notify the party of the second part in writing that such condition exist, and in case party of the second part refuses to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or comply with any order it may receive to that effect, or in case the work from the want of sufficient or proper workman or material is not proceeding with all the necessary dispatch, the party of the first part shall, after giving ten (10) days notice in writing to the party of the second part, its manager or agent, have full power without vitiating this contract, to take the works wholly or in part out of the hands of party of the second part, to appropriate or use any or all materials, tools and appliances belonging to party of the second part, or provided by him for the work as may be suitable or acceptable, and to engage or [54] employ any other persons or workmen to do the work by contract or day labor, and procure all requisite materials and implements for the due execution and completion of the said works, and the costs and charges incurred by it in so doing shall be ascertained by party of the first part and shall be paid for by the party of the second part or deducted from moneys due or to become due under this or any other contract with party of the first part.

4. Party of the second part covenants and agrees to carry liability insurance in an amount and in a company satisfactory to party of the first part, protecting them against accidents and injuries to their employees, and to furnish a copy of such liability insurance policy and any changes that may be made thereon from time to time to party of the first part.

5. Party of the second part further agrees to comply with all State and Federal laws and regulations in and about the doing of said work.

6. The party of the second part further covenants, promises and agrees to keep harmless and indemnify the party of the first part against all claims of persons or corporations for materials, property or services furnished for said work hereby sublet, and from all loss or damage to which the party of the first part may be subjected in any manner or form or on account of injuries sustained by persons or property on account of the work done by party of the second part, its agents or servants hereunder.

7. It is further understood and agreed that if any dispute shall arise between the party of the second part and any other sub-contractor from party of the first part, such dispute shall be settled by a board of arbitrators, one of whom shall be appointed by the party of the second part, one by the other sub-contractor, and the third by these two, and the decision shall [55] be final. Any other dispute arising over the performance of such work shall be similarly arbitrated or settled.

8. The party of the first part hereby covenants and agrees to pay for the doing of the aforesaid work at the prices hereinbefore set forth, less five per cent to be retained by said party of the first part until the completion of the work to be done by said second party, on the twentieth day of each calendar month for all work done during the preceding calendar month, unless the work done during the preceding calendar month shall not have been accepted by the State Engineer, in which case the party of the first part shall not be required to pay the party of the second part until the work is so accepted as required under the terms of this agreement.

9. It being further agreed by the party of the first part that in case the said party of the second part shall for any reason brought about by the act of the said party of the first part, be held up or prevented from doing the work contracted to be done, by virtue of litigation, said party of the first part will pay to said party of the second part all damage occasioned to said party of the second part by virtue of its being unable to proceed with the work, such amount to be settled as is hereinbefore provided.

10. It is further understood and agreed that the party of the second part will furnish before beginning work under the sub-contract to the party of the first part a bond or bonds executed by a surety company approved by party of the first part, guaranteeing the faithful performance on its part of the terms and conditions of this contract, and guarantee-

ing the payment of all bills incurred by party of the second part for material and labor, property or services furnished to party of the second part for the said work, or on account of or in connection [56] therewith. Said bond shall be in the sum of not less than Forty-two Thousand One Hundred Seventy-six and 75/100 Dollars ($42,176.75); and it is further understood and agreed that if at any time there shall be evidence of any unpaid bills incurred by party of the second part for material or labor or property or services furnished for said work, or in connection therewith, or any evidence of any claim against party of the second part for which party of the first part might be held liable and is entitled to be protected against by party of the second part, the party of the first part may withhold the payment of sufficient money due to party of the second part to cover such material or labor bills or other liabilities.

The party of the second part covenants and agrees to complete the work herein provided for within the period of seven (7) months from the date of beginning, and at all times to proceed with said work at a rate of progress that will insure its completion within said seven (7) months' period.

IN WITNESS WHEREOF, said parties have hereto set their hands the day and year first above written.

PHOENIX–TEMPE STONE COMPANY.
By (Signed) E. P. CONWAY,
President,
Party of the First Part.
DEWAARD and SONS.
By (Signed) L. DeWAARD,
Party of the Second Part. [57]

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, DEWAARD and SONS, a copartnership, as Principal, and STANDARD ACCIDENT INS. COMPANY, as surety, are jointly and severally bound unto the PHOENIX–TEMPE STONE COMPANY, a corporation, in the sum of Forty-two Thousand One Hundred Seventy-six and 75/100 ($42,176.75) Dollars, lawful money of the United States of America, to be well and truly paid to the said Phoenix-Tempe Stone Company, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that if the above bounden principal, DEWAARD and SONS, their heirs, successors and assigns, shall in all things and in all respects, stand to and abide by, well and truly keep, and faithfully perform, all of the covenants, conditions and agreements of a Contract, hereto attached, made between said prin-

cipal, as sub-contractor, and the Phoenix-Tempe Stone Company, for the making of certain improvements and for the doing of certain work upon a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, all in compliance with the said Contract between said Phoenix-Tempe Stone Company and said principal, in the manner and form therein specified and shall promptly pay for all materials, property, labor, work and services furnished, done, or performed, upon or in connection with said improvements and work, or in the performance thereof at the time said payments became due, and shall keep harmless and indemnify said Phoenix-Tempe Stone Company against all claims for loss or damage on account of injuries sustained by persons or property, in or o naccount of the performance of said work, then this obligation shall be null and void, otherwise it shall remain in full force and virtue. [58]

IN WITNESS WHEREOF, we have caused these presents to be executed this 27th day of May, 1924.

(Signed) DEWAARD & SONS.
By L. DEWAARD.
STANDARD ACCIDENT INSURANCE COMPANY.
By (Signed) LASSER H. GORNETZKY,
Atty.-in-fact.
Attest: M. KINGSBURY, (Seal)
Atty-in-fact.

[Endorsed]: Filed Jul. 8, 1925. [59]

[Title of Court and Cause.]

MOTION TO BRING IN ADDITIONAL CROSS-DEFENDANTS AND ORDER GRANTING SAME. [60]

Comes now the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant in the above-entitled action and moves the court now here for an order to bring in as additional cross-defendants in said cause the following named persons: H. F. Willis, Charles Rogers, George Winsor and John R. Coleman, a copartnership, doing business under the name and style of Willis, Rogers, Winsor & Coleman, and that said cross-complainant be permitted to so amend its cross-complaint as to contain apt and appropriate allegations affecting the relationship and liability between said additional defendants and the other parties hereto, an engrossed copy of said proposed pleading being attached hereto and made a part of this motion and to be considered in connection therewith, and that the process of this court be duly issued and served upon each of said additional cross-defendants, requiring them and each of them to appear herein as said cross-defendants and make answer to said cross-complaint within the time and in the manner required by law therefor.

Said cross-complainant further moves for permission to amend his cross-complaint by incorporating therein an additional amount of expenditure made by said cross-complainant in the com-

pletion of the work of construction provided for in the contract between cross-complainant and plaintiffs herein, amounting to the sum of One Hundred Ninety-nine and 18/100 ($199.18) Dollars.

These amendments are based upon necessity arising from the fact that cross-complainant was not informed concerning either of said items at the time of the filing of the original cross-complaint and is also based upon all the files and records in said cause.

Dated this 30th day of March, 1926.

KIBBEY, BENNETT, GUNST, SMITH & LYMAN,

Attorney for Cross-complainant. [61]

ORDER.

Upon presenting the foregoing motion by the cross-complainant in the above-entitled cause, it appearing that good cause exists for including certain parties as additional cross-defendants in said action;

IT IS ORDERED that said persons, to wit: H. F. Willis, Charles Rogers, George Winsor and John R. Coleman, a copartnership, doing business under the name and style of Willis, Rogers, Winsor & Coleman, be brought into said cause as cross-defendants, by service upon them and each of them of the process of this court appropriate therefor and that they be required to answer in due time.

IT IS FURTHER ORDERED that said cross-complainant be and it is hereby permitted to amend its cross-complaint to conform to the engrossed copy thereof attached to said motion.

Dated this 30th day of March, 1926.

_____,

Judge. [62]

[Title of Court and Cause.]

AMENDED CROSS-COMPLAINT. [63]

The Phoenix-Tempe Stone Company having heretofore answered the complaint herein does now and herewith tender its amended cross-complaint to this court as against said DeWaard & Sons and the other above-named cross-defendants in further disclosure of and relating to the same subject matter upon which said complaint is alleged to be based, and respectfully shows to the Court:

I.

That said cross-complainant is a corporation organized, existing and doing business under the laws of the State of Arizona, having its office and principal place of business at Phoenix, Arizona.

That cross-complainant is informed and believes and upon such information alleges that said cross-defendants, L. DeWaard, H. DeWaard and L. DeWaard, Jr., are copartners, and doing business under the firm name and style of DeWaard & Sons. That none of said copartners are residents or *or* have any place of business in the State of Arizona, but are residents of and do business in the city of San Diego in the State of California.

That Standard Accident Insurance Company of Detroit is a corporation duly organized, existing

and doing business under the laws of the State of Michigan and is and was at all times hereinafter mentioned a Surety Company authorized to become surety upon bonds in the State of Arizona.

That Benson Lumber Company is as cross-complainant is informed and believes and therefore alleges, a corporation organized under the laws of the State of California, having its office and principal place of business in the city of San Diego, California.

That cross-defendants, Pratt-Gilbert Company, Guardian Trust Company, Union Oil Company of Arizona, Arizona Grocery Company, Motor Supply Company and McGrath Mule Company are all and each of them is a corporation duly organized, existing and [64] doing business under and by virtue of the laws of the State of Arizona, each thereof having its office and principal place of business in the county of Maricopa, Arizona.

That cross-defendants, Bashford-Burmister Company and Head Lumber Company, are both and each of them is a corporation organized, existing and doing business under the laws of the State of Arizona and each has its office and principal place of business at the city of Prescott, State of Arizona.

That L. J. Haselfeld is a resident of the city of Prescott, Arizona.

That Jules Vermeesch, Redmond Toohey and Ezra W. Thayer, are individuals doing business and residing in Maricopa County, Arizona.

That Spencer Burke is a resident of Yavapai County, Arizona.

That said cross-defendants, H. F. Willis, Charles Rogers, George Winsor and John R. Coleman, a copartnership, doing business under the firm name and style of Willis, Rogers, Winsor & Coleman, are all residents of Yavapai County, State of Arizona.

II.

That heretofore, on or about the 17th day of May, 1924, said cross-complainant, Phoenix-Tempe Stone Company, contracted with the State Engineer of the State of Arizona as such engineer and not individually, but acting in accordance with and under the provisions of the laws of the State of Arizona, for the construction of a certain highway known as Prescott-Phoenix Highway, Federal Aid Project No. 72–A.

That said cross-complainant was required by the terms of said contract to fully finish and complete the work of construction provided for therein on or before the 31st day of December, 1924.

That as a condition precedent to said contract and coincident [65] to the execution thereof, said cross-complainant executed and delivered to said engineer of the State of Arizona, two certain bonds on each of which said bonds said Phoenix-Tempe Stone Company was principal and the Maryland Casualty Company, was surety; that by the terms of one of said bonds said Phoenix-Tempe Stone Company became bound to fully perform, execute and complete the work of construction provided for in said contract with said State Engineer, and by the terms and conditions of the

other of said bonds said Phoenix-Tempe Stone Company became bound by the following provisions and terms of said bond, to wit:

"NOW, THEREFORE, if the said contractor to whom said contract was awarded, or any assigns of his, or any sub-contractor under said contract, fails to pay all moneys due or to become due for or on account of any materials or property so furnished in the said work or improvement, or the performance thereof, or for any work, labor or services done thereon or furnished therefor, the said surety will pay the same to an amount not exceeding the sum hereinabove specified.

"This bond shall inure to the benefit of any and all persons, companies, or corporations who may have claims against such contractors, or any sub-contractor under said contract, for or on account of labor or services performed, or material or property furnished for, or used in the said work or improvement, or the performance thereof, as provided by the Laws of Arizona."

That said contract and said bonds were delivered to the State Engineer of Arizona and filed in his office.

III.

That thereafter on or about the 27th day of May, 1924, said cross-defendant, DeWaard & Sons, entered into a certain written contract with said cross-complainant for the construction of a portion of said highway, such portion being particularly

specified in said contract, a copy of which contract is hereto attached and made a part hereof as though written at full herein. That coincident with the execution and delivery of said last-mentioned contract and as a condition precedent thereto, said DeWaard & Sons as principal, and cross-defendant, Standard [66] Accident Insurance Company, as surety, executed and delivered a certain bond to said cross-complainant wherein and whereby the parties thereto became bound to the Phoenix-Tempe Stone Company by the terms and conditions thereof to fully keep and perform all of the covenants, conditions and agreements of said contract between DeWaard & Sons and Phoenix-Tempe Stone Company, for the making of certain improvement and for the doing of that certain work upon a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, all in compliance with the said contract in the manner and form therein specified and to promptly pay for all materials, property, labor, work and services furnished, done or performed upon or in connection with said improvement and work or in the performance thereof at the time said payments became due. That a copy of said bond is hereto attached and made a part hereof.

That thereupon said subcontractor, DeWaard & Sons, entered upon the performance and execution of said contract.

IV.

That by the terms of said subcontract, DeWaard & Sons were required to complete the work therein

provided for on or before seven months from and after the commencement of the execution of said contract and not later than seven months from and after the 2d day of June, 1924, and were further required to at all times furnish and provide for the performance and execution thereof sufficient and proper workmen and material to carry on the work with necessary dispatch and that in default thereof, said Phoenix-Tempe Stone Company, might and would after ten days' notice in writing to said subcontractor, have full power to take the works out of the hands of said subcontractor and perform and complete the same. That the said DeWaard & Sons wholly failed, neglected and refused to provide sufficient or proper workmen or material for the necessary dispatch [67] and progress of said work to furnish adequate equipment to carry on the same. That said Phoenix-Tempe Stone Company in accordance with the provisions of said construction contract and acting under the authority therein given, did, on or about the 3d day of January, 1925, duly give to said DeWaard & Sons notice in writing of their said failure to provide necessary equipment, material or workmen for the adequate and necessary dispatch of said work. That more than ten days thereafter the said DeWaard & Sons still continuing and persisting in their failure to furnish or supply the necessary, sufficient or requisite workmen or equipment for the necessary dispatch and progress of said work, said Phoenix-Tempe Stone Company, took over and took possession of said

work and thereupon and thenceforth proceeded to and did carry out, finish and complete the same in accordance with the plans and specifications therefor and under the direction, with the approval and to the satisfaction of the State Engineer.

That in so completing and carrying out the work so taken over by it and for which said DeWaard & Sons had contracted and bound itself to perform, the said Phoenix-Tempe Stone Company necessarily expended and became charged with the sum of Thirty-one Thousand Eight Hundred Fifty-two and 80/100 ($31,852.80) Dollars.

That the materials furnished and the labor performed in connection therewith, were and are of the reasonable value of said sum.

That said cross-complainant has been reimbursed by payments from the State of Arizona on account of its execution of said contract, in the sum of Twenty-six Thousand Nine Hundred Sixty and 39/100 ($26,960.39) Dollars.

That said cross-complainant further paid out as it was required to do under the terms of its said contract with the [68] State Engineer, the sum of One Thousand Seven Hundred Sixty-seven and 91/100 ($1,767.91) Dollars, on account of labor performed for and at the request of said DeWaard & Sons in the partial performance of their contract and for which they neglected and refused to pay. That said amount was a just and reasonable charge for the labor so performed.

V.

That said cross-defendants, Pratt-Gilbert Com-

pany, a corporation, Bashford-Burmister Company, a corporation, Guardian Trust Company, a corporation, Union Oil Company of Arizona, a corporation, Arizona Grocery Company, a corporation, Motor Supply Company, a corporation, Western Pipe & Steel Company, a corporation, Head Lumber Company, a corporation, McGrath Mule Company, a corporation, Benson Lumber Company, a corporation, L. J. Haselfeld, Jules Vermeesch, Redmond Toohey, Ezra W. Thayer, Spencer Burke, H. F. Willis, Charles Rogers, George Winsor and John R. Coleman, a copartnership, doing business under the name and style of Willis, Rogers, Winsor & Coleman, have, or claim to have furnished materials, property, labor, work and services done or performed upon or in connection with said work and improvement said improvements and work or in the performance thereof at the instance and request and for the benefit of said DeWaard & Sons.

That cross-complainant is without any knowledge or information or belief sufficient to enable it to determine which, if any, of said claims are valid, legal and existing claims, or which, if any, of said claims constitute liabilities against this cross-complainant under its contract with the State Engineer and its bond for the performance thereof, or any of them, or at all, and on account of said lack of knowledge, information or belief, and basing its allegations on that ground alone, cross-complainant, alleges that said claims of said cross-defendant claimants are [69] and each of them is without

right and constitute no liability against said cross-complainant.

WHEREFORE, cross-complainant prays:

1. That all of said cross-defendant claimants be summoned and required to appear herein and set forth and establish what, if any, claim they have for which said cross-complainant is liable under its said contract;

2. That it have judgment against said cross-defendants, DeWaard & Sons, and Standard Accident Insurance Company for the full amount of Six Thousand Six Hundred Sixty and 32/100 ($6,660.32) Dollars expended by it in the completion and performance of the said contract of DeWaard & Sons and in payment of said labor claims incurred by said DeWaard & Sons, with interest thereon at six per cent per annum, together with such further sums as said cross-complainant may be found liable for, if any, to the said cross-complainant claimants for material, labor or property furnished to the said DeWaard & Sons in the performance of their contract, for the costs of this action and for such other and further relief as may be just and equitable in the premises.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Attorneys for Cross-complainant. [70]

SUB-CONTRACT.

THIS AGREEMENT, made this 27th day of May, 1924, by and between the PHOENIX-TEMPE STONE COMPANY, an Arizona corporation,

hereinafter called the party of the first part, and L. de Waard, H. de Waard, and L. de Waard, Jr., a copartnership doing business under the firm name and style of DE WAARD AND SONS, of San Diego, California, hereinafter called the party of the second part;

WITNESSETH:

That whereas, the party of the first part has entered into a contract with the State Engineer of the State of Arizona for the construction of a portion of the Prescott-Phoenix Highway, known as Federal Aid Project Number 72–A, said work being fully described in the specifications therefor issued by the State Engineer, and in the said contract between the party of the first part and said State Engineer; and

WHEREAS, the party of the first part is desirous of subletting a portion of said work hereinafter described, and the said party of the second part is desirous of subcontracting said portion of said work upon the terms and conditions hereinafter stated;

NOW, THEREFORE, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows, to-wit:

1. Party of the first part sub*k*ets to the party of the second part, and the party of the second part does sub-contract from the party of the first part all of the following items on said work as designated upon the plans and specifications prepared for said work by the said State Engineer, and the party of the second part covenants and agrees to do

all of the said work hereby sublet at the following unit prices, to-wit:

The items of said work hereby sub-contracted and agreed to be done and performed by the party of the second part, and the [71] price at which said work is agreed to be done are as follows:

1807 cubic yards excavation for structures, .85 per cubic yard.

607 cubic yards Class A Concrete, 16.15 per cubic yard.

191 cubic yards Class B Concrete, 15.30 per cubic yard.

184 cubic yards Class C Concrete, 13.60 per cubic yard.

225 cubic yards Rubble Masonry, 8.50 per cubic yard.

3 Cattle Guards, 106.25 each.

525 Linear feet Guard Fence, 0.85 per linear ft.

658 Linear feet 24 inch pipe, haul and place, 0.59½ per linear ft.

390 Linear feet 30 inch pipe, haul and place, 0.68 per linear ft.

284 Linear feet 36 inch pipe, haul and place, 0.85 per linear ft.

325 cubic yards excavation for structures 0.85 per cubic yard.

40530 lbs. steel, haul, place and bend 0.04¼ per lb.

90 cubic yards backfill excavation 0.85 per cubic yard.

532 cubic yards Class A Concrete, 21.25 per cubic yard.

20 cubic yards Class B Concrete, 17.00 per cubic yard.

140 linear feet steel Cylinders, 34.00 per linear ft.

66242 lbs. steel, haul, place and bend, 0.04¼ per lb.

195 cubic yards rock backfill, 2.12½ per cubic yard.

50 cubic yards Riprap 2.55 per cubic yard.

Any extra work required to be done by the State Engineer in connection with the above, under the terms of the contract between party of the first part and the State Engineer shall be paid for on the basis of cost plus ten per cent, on the same basis as is provided in the specifications of the State Engineer.

It is understood and agreed that the above prices include furnishing of material and labor to put the above mentioned items in place according to the plans and specifications of the State Engineer, and all work incidental thereto, excepting the furnishing of material, which is agreed to be furnished by the State under the contract between party of the first part and the State Engineer.

2. It is expressly understood and agreed that the quantity of work to be done hereunder, as shown on the plans and specifications of said State Engineer, and as shown herein, are subject to change and modification by the State Engineer, and the party of the second part shall do and perform all of said work and improvements as may be required by said State Engineer at the prices hereinbefore quoted, whether the quantities of said work may be increased or diminished, and the

party of the second part shall be paid for said work and improvements only according [72] to the estimates of said State Engineer. The party of the second part, however, hereby agrees that it will have no negotiations with the State Engineer; directly, except such negotiations as may be held and can be held in the field in arranging the work to be done under the terms of this contract. All other negotiations shall be through the party of the first part.

3. The party of the second part further covenants, promises and agrees that it will properly and in a workmanlike manner do all of the work aforesaid according to the said plans, specifications and contract with the State Engineer, and to the satisfaction and approval of the said State Engineer; that it will begin the work of construction not later than June 2, 1924;

That if at any time said work or any part thereof are not executed or being executed in a sound and workmanlike manner, and in all respects in strict conformity with the specifications therefor, and to the satisfaction of party of the first part, party of the first part will notify the party of the second part in writing that such conditions exist, and in case party of the second part refuses to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or comply with any order it may receive to that effect, or in case the work, from the want of sufficient or proper workmen or materials, is not proceeding with all necessary dispatch, the party of the first part shall, after giving ten (10)

days' notice in writing to the party of the second part, its manager or agent, have full power without violating this contract, to take the works wholly or in part out of the hands of party of the second part, to appropriate or use any or all materials, tools and appliances belonging to party of the second part, or provided by him for the work as may be suitable or acceptable, and to engage or employ any other persons or workmen to do the work by contract or day labor, and procure all requisite materials and implements [73] for the due execution and completion of the said works, and the cost and charges incurred by it in so doing shall be ascertained by party of the first part and shall be paid for by the party of the second part or deducted from moneys due or to become due under this or any other contract with party of the first part.

4. Party of the second part covenants and agrees to carry liability insurance in an amount and in a company satisfactory to party of the first part, protecting them against accidents and injuries to their employees, and to furnish a copy of such liability insurance policy and any changes that may be made thereon from time to time to party of the first part.

5. Party of the second part further agrees to comply with all State and Federal laws and regulations in and about the doing of said work.

6. The party of the second part further covenants, promises and agrees to keep harmless and indemnify the party of the first part against all claims of persons or corporations for materials, property or services furnished for said work hereby

sublet, and from all loss or damage to which the party of the first part may be subjected in any manner or form or on account of injuries sustained by persons or property on account of the work done by party of the second part, its agents or servants hereunder.

7. It is further understood and agreed that if any dispute shall arise between the party of the second part and any other subcontractor from party of the first part, such dispute shall be settled by a board of arbitrators, one of whom shall be appointed by the party of the second part, one by the other subcontractor, and the third by these two, and the decision shall be final. Any other dispute arising over the performance of such work shall be similarly arbitrated or settled. [74]

8. The party of the first part hereby covenants and agrees to pay for the doing of the aforesaid work at the prices hereinbefore set forth, less five per cent to be retained by said party of the first part until the completion of the work to be done by said second party, on the twentieth day of each calendar month for all work done during the preceding calendar month, unless the work done during the preceding calendar month shall not have been accepted by the State Engineer, in which case the party of the first part shall not be required to pay the party of the second part until the work is so accepted as required under the terms of this agreement.

9. It being further agreed by the party of the first part that in case the said party of the second part shall for any reason brought about by the act

of the said party of the first part, be held up or prevented from doing the work contracted to be done, by virtue of litigation, said party of the first part will pay to said party of the second part all damage occasioned to said party of the second part by virtue of its being unable to proceed with the work, such amount to be settled as is hereinbefore provided.

10. It is further understood and agreed that the party of the second part will furnish before beginning work under the subcontract to the party of the first part a bond or bonds executed by a surety company approved by party of the first part, guaranteeing the faithful performance on its part of the terms and conditions of this contract, and guaranteeing the payment of all bills incurred by party of the second part for material and labor, property or services furnished to party of the second part for the said work, or on account of or in connection therewith. Said bond shall be in the sum of not less than Forty-two Thousand One Hundred Seventy-six and 75/100 Dollars ($42,176.75); and it is further understood and agreed that [75] if at any time there shall be evidence of any unpaid bills incurred by party of the second part for material or labor or property or services furnished for said work, or in connection therewith, or any evidence of any claim against party of the second part for which party of the first part might be held liable and is entitled to be protected against by party of the second part, the party of the first part may withhold the payment of sufficient money due to party

of the second part to cover such material or labor bills or other liabilities.

The party of the second part covenants and agrees to complete the work herein provided for within the period of seven (7) months from the date of beginning, and at all times to proceed with said work at a rate of progress that will insure its completion within said seven (7) months' period.

IN WITNESS WHEREOF, said parties have hereto set their hands the day and year first above written.

PHOENIX–TEMPE STONE COMPANY.
By (Signed) E. P. CONWAY, President,
Party of the First Part.
DEWAARD and SONS.
By (Signed) L. DEWAARD,
Party of the Second Part. [76]

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, DEWAARD and SONS, a copartnership, as principal, and STANDARD ACCIDENT INS. COMPANY, as surety, are jointly and severally bound unto the PHOENIX–TEMPE STONE COMPANY, a corporation, in the sum of Forty-two Thousand One Hundred Seventy-six and 75/100 ($42,176.75) Dollars, lawful money of the United States of America, to be well and truly paid to the said Phoenix-Tempe Stone Company, for which payment well and truly to be made, we bind ourselves, our and each of our, heirs, successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that if the above bounden principal, De Waard and Sons, their heirs, successors and assigns, shall in all things and in all respects, stand to and abide by, well and truly keep, and faithfully perform, all of the covenants, conditions and agreements of a contract, hereto attached, made between said principal, as subcontractor, and the Phoenix-Tempe Stone Company, for the making of certain improvements and for the doing of certain work upon a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, all in compliance with the said contract between said Phoenix-Tempe Stone Company and said principal, in the manner and form therein specified and shall promptly pay for all materials, property, labor, work and services furnished, done or performed, upon or in connection with said improvements and work, or in the performance thereof at the time said payments became due, and shall keep harmless and indemnify said Phoenix-Tempe Stone Company against all claims for loss or damage on account of injuries sustained by persons or property, in or on account of the performance of said work, then this obligation shall be null and void. Otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, we have caused these presents to be [77] executed this 27th day of May, 1924.

(Signed) DEWAARD & SONS.
By L. DEWAARD.
STANDARD ACCIDENT INSURANCE COMPANY.
By (Signed) LASSER H. GORNETZKY,
Atty.-in-fact.
Attest: M. KINGSBURY, (Seal)
Atty.-in-fact.

[Endorsed]: Received service of within motion and pleadings this 31st day of March, 1926.
GREER AND GREER,
THOS. R. GREER,
Attorneys, Willis, Winsor, Rogers & Coleman.

[Endorsed]: Filed Apr. 5, 1926. [78]

[Title of Court and Cause.]

DEMURRER.

Come now the plaintiffs in the above-entitled action, and demur to the defendant's answer herein upon the following grounds:

I.

That the allegations of said answer do not constitute a denial of or a defense to plaintiffs' cause of action herein.

II.

That the said answer does not state facts sufficient

to constitute a defense, or answer to plaintiffs' complaint.

CROUCH & SANDERS,
Attorneys for Plaintiffs. [79]

[Endorsed]: Filed Jul. 28, 1925. [80]

[Title of Court and Cause.]

DEMURRER TO CROSS-COMPLAINT.

Come now the cross-defendants, L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners, doing business under the firm name and style of DeWaard & Sons, and the Standard Accident Insurance Company of Detroit, a corporation, and severing themselves from their cocross-defendants, demur to the cross-complaint filed by the Phoenix-Tempe Stone Company, a corporation, herein, and for grounds of demurrer allege:

I.

That the said cross-complaint does not state facts sufficient to constitute a cause of action against the said cross-defendants, or any of them, and does not state facts sufficient to constitute a cross-complaint, or any defense, counterclaim, or cause of action thereon.

II.

That the matters and things alleged in said cross-complaint do not relate to the same subject matter, or transaction [81] set out in plaintiffs' complaint herein.

III.

That the said cross-complaint is unintelligible for the following reasons:

(a) It cannot be ascertained therefrom what work, or labor, the cross-complainant did and performed whereby it claims to have expended the sum of Thirty-one Thousand Eight Hundred and Fifty-two Dollars and Eighty Cents ($31,852.80), as alleged in Paragraph IV of its cross-complaint.

(b) It cannot be ascertained therefrom what labor, or work, or material, it paid, did, or performed, whereby it became liable for and paid the sum of One Thousand Five Hundred and Sixty-eight Dollars and Seventy-three Cents ($1,568.75), as alleged in Paragraph IV of its cross-complaint.

(c) It cannot be ascertained therefrom whether or not it has received from the State of Arizona all of the money to which it is entitled by reason of the contract alleged in the said cross-complaint, or whether or not the sum of Twenty-six Thousand Nine Hundred and Sixty Dollars and Thirty-nine Cents ($26,960.39), as alleged in Paragraph IV of said cross-complaint, is all the money cross-complainant has received from the State of Arizona on account of said contract.

(d) It cannot be ascertained from said cross-complaint what materials, or property, or labor, or work, or services, have been done, or performed by any of the cocross-defendants herein, in connection with the work or improvement mentioned in said cross-complaint.

(e) It cannot be ascertained from said cross-complaint whether or not the alleged failure of the cross-defendants, DeWaard & Sons, to complete certain work described in said cross-complaint, was caused by, *and a* result of a default, or failure on the part of the cross-complainant to perform its [82] obligations, or any of its obligations, to the said DeWaard & Sons.

(f) It cannot be ascertained therefrom what materials and labor the cross-complainant intends to allege that it has furnished and performed in connection with work described in said cross-complaint so that it can be ascertained by a statement of the materials furnished and labor performed, whether or not such materials furnished and labor performed, are of the reasonable value of Thirty-one Thousand Eight Hundred and Fifty-two Dollars and Eighty Cents ($31,852.80), or any other value.

IV.

That the said cross-complaint is ambiguous for the same reasons that it is hereinbefore alleged to be unintelligible.

V.

That the said cross-complaint is uncertain for the same reasons that it is hereinbefore alleged to be unintelligible and ambiguous.

VI.

That there has been a misjoinder of parties cross-defendant; in that all of the cross-defendants, except DeWaard & Sons, are strangers to the original action herein, and not proper parties cross-defendant.

VII.

That there has been a misjoinder of causes of action attempted to be set out in the said cross-complaint; in that there has been an attempt to join an action for damages by reason of breach of contract, with an action for goods, wares and merchandise, labor and material, purchased, done and performed by the cross-defendants.

That there is a further attempted uniting in one action of an alleged cause of action existing against the surety, [83] the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant herein, with an action of interpleader against the other co-defendants herein.

VIII.

That it appears from the cross-complaint that the alleged claims of all of the other cross-defendants are without right and constitute no liability or obligation against the cross-complainant; and that therefore, the said cross-complainant does not state any cause of action as to said other cross-defendants, and all allegations relating to said cocross-defendants state no cause of action against these cross-defendants.

JOE CRIDER, Jr.,

Attorney for the Cross-defendant, Standard Accident Insurance Company of Detroit, a Corporation.

CROUCH & SANDERS,

Attorneys for L. DeWaard, H. DeWaard, and L. DeWaard, Jr., Plaintiffs, and the said Cross-defendant. [84]

[Title of Court and Cause.]

MOTION TO STRIKE.

Come now the cross-defendants, L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners, doing business under the firm name and style of DeWaard & Sons, and the Standard Accident Insurance Company of Detroit, a corporation, and severing themselves from their cross-defendants herein, hereby move to strike the demurrer of the defendant herein from the files upon the grounds that the time for filing said demurrer has passed, and that a former demurrer interposed by the defendant and cross-complainant has been heretofore overruled.

II.

The said cross-defendants further move the Court to strike out the entire cross-complaint filed herein, upon the grounds that the said cross-complaint and the whole thereof, is irrelevant and redundant matter, and has no materiality to any of the issues raised by the complaint and answer herein. [85]

III.

Said cross-defendants further move the Court, in the event their motion to strike the whole of said cross-complaint be denied, to strike from said cross-complaint, the following:

(a) All of Subdivision II of said cross-complaint. This is made upon the grounds that the whole thereof is irrelevant and redundant matter, and not

material to any issues either in the cross-complaint or complaint herein, and an attempt to allege the terms and effect of public documents without setting forth the documents themselves; and that said allegation, if permitted to stand or remain in the cross-complaint, should be supplemented by a reference to the documents quoted from and an incorporation of such documents by reference into the cross-complaint.

(b) All of Subdivision IV, commencing with the words: "That the said," appearing at the end of line 12 of said Subdivision IV to the end of Subdivision IV.

(c) All of Subdivisions V of said cross-complaint.

IV.

That it appears from the cross-complaint that the alleged claims of all of the other codefendants are without right and constitute no liability against the cross-complainant; and that therefore no cause of action exists between the cross-defendants and the cross-complainant, and that all of them are not proper parties to said cross-complaint, and all reference to such cross-defendants should be stricken therefrom.

The grounds for moving the Court to strike out portions of the cross-complaint, as above specified, are that said portions, and the whole thereof, are

irrelevant, redundant and immaterial matter, and legal conclusions, and not allegations [86] of fact

JOE CRIDER, Jr.,

Attorney for the Cross-defendant, Standard Accident Insurance Company of Detroit, a Corporation.

CROUCH & SANDERS,

Attorneys for L. DeWaard, H. DeWaard and L. DeWaard, Jr., Plaintiffs and Cross-defendants, and Said Cross-defendant.

[Endorsed]: Filed Jul. 28, 1925. [87]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT.

Come now the cross-defendants, L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners, doing business under the firm name and style of DeWaard & Sons, and the Standard Accident Insurance Company of Detroit, a corporation, and severing themselves from their cocross-defendants, and answering cross-complainant's cross-complaint, without waiving their demurrer and motion to strike heretofore filed herein, and expressly relying thereon, and provided only that said demurrer and motion to strike be overruled, admit, deny and allege as follows:

I.

Deny that the Phoenix-Tempe Stone Company has heretofore filed an answer to plaintiffs' complaint herein; and deny that the cross-complaint

herein is in further disclosure of and/or relating to the same subject matter, transaction, or cause of action alleged in plaintiffs' complaint, and allege that the entire transaction and purported cause of action set forth in [88] defendant's cross-complaint is a separate and distinct cause of action to the cause of action alleged in plaintiffs' complaint.

II.

Answering the allegations contained in Paragraph III of cross-complainant's cross-complaint, said cross-defendants deny that in compliance with the said contract described in the said Paragraph III, as having been entered into on the 27th day of May, 1924, or in any other contract, the said cross-defendants in the manner and form therein specified, or in any manner and form, agreed to promptly pay for all materials, or property, or labor, or work, or services furnished, done, or performed upon, or in connection with the said improvement, being the construction of a portion of the Prescott-Phoenix Highway, Federal Aid Project No. 72–A, or for the work done, about, or in the performance of the construction of the said improvement at the time said payment became due, or at any time, or at all.

III.

Answering the allegations contained in Paragraph IV of said cross-complaint, said cross-defendants deny that by the terms of said subcontract, or any other contract, deWaard & Sons were required to at all times furnish, or provide for the performance and execution of the work described

in said contract, sufficient or proper workmen, or material to carry on the work with necessary dispatch; and they deny that in default thereof, or of any other default, the said Phoenix-Tempe Stone Company might, or could, or would, after ten days' notice, or any other notice, in writing, to said subcontractor, have full power, or any power, to take the works out of the hands of said subcontractor, and perform or complete the same; and deny that the said deWaard & Sons wholly failed, or neglected, or refused to provide sufficient or proper workmen, or material for the necessary dispatch, or progress of said work to furnish adequate [89] equipment to carry on the same; and deny that the said Phoenix-Tempe Stone Company in accordance with the provisions of said construction contract, or any contract, or acting under the authority therein given, did, on or about the 3d day of January, 1925, or at any time, duly give, or give, to said DeWaard & Sons, notice in writing of their alleged failure to provide necessary equipment, material, or workmen for the adequate or necessary dispatch of said work; and deny that more than ten days thereafter, or any time, the said DeWaard & Sons still continued or persisted, or ever failed to furnish or supply the necessary or sufficient or requisite number of workmen, or equipment for the necessary dispatch or progress of said work; and deny that the said Phoenix-Tempe Stone Company took over and took possession of said work, and thereupon and thenceforth proceeded to, or did carry out, or finish or complete the same, in ac-

cordance with the plans and specifications therefor, or under the direction, or with the approval, or to the satisfaction of the State Engineer.

Said cross-defendants further deny that in so completing or carrying out the work so taken over by the Phoenix-Tempe Stone Company, or for which said DeWaard & Sons had contracted or bound itself to perform, the said Phoenix-Tempe Stone Company necessarily expended, or became charged with the sum of Thirty-one Thousand Eight Hundred and Fifty-two Dollars and Eighty Cents ($31,852.80), or any other sum.

Said cross-defendants further deny that any materials furnished, or any labor performed, in connection therewith, were or are of the reasonable value of said sum, or of any other sum.

Said cross-defendants have no knowledge, information or belief respecting the amount of money alleged to have been paid the cross-complainant by the State of Arizona, and basing [90] their denial upon such lack of knowledge, information and belief, deny that the State of Arizona has paid the cross-complainant the sum of Twenty-six Thousand Nine Hundred and Sixty Dollars and Thirty-nine Cents ($26,960.39).

Said cross-defendants further deny that cross-complainant further paid out, or paid out, as it was required to do under the terms of its said contract with the State Engineer, or any other contract, or obligation, the sum of One Thousand Five Hundred and Sixty-eight Dollars and Seventy-three Cents ($1,568.73), on account of labor performed,

for, and/or at the request of said DeWaard & Sons in the partial performance, or performance, of their contract for which they, the said DeWaard & Sons, refused, or neglected to pay; and deny that said amount was a just or reasonable charge for the alleged labor so performed.

IV.

Answering the allegations contained in Paragraph V of the said cross-complaint, cross-defendants deny that the Pratt-Gilbert Company, a Corporation, or the Bashford-Burmister Company, a Corporation, or the Guardian Trust Company, a Corporation, or the Union Oil Company of Arizona, a Corporation, or the Arizona Grocery Company, a Corporation, or the Motor Supply Company, a Corporation, or the Western Pipe & Steel Company, a Corporation, or the Head Lumber Company, a Corporation, or the McGrath Mule Company, a Corporation, or the Benson Lumber Company, a Corporation, or L. J. Haselfeld, or Jules Vermeesch, or Redmond Toohey, or Ezra W. Thayer, or Spencer Burke, have, or claim to have furnished materials, or property, or labor, or work, or services, done, or performed upon, or in connection with the said work, or improvement, or improvements, which work, or any performance thereof, at the instance or request, or for the benefit of said DeWaard & Sons. [91]

As a further and separate defense to the cross-complaint, said cross-defendants hereby incorporate all of their complaint herein as a further and sep-

arate defense to said cross-complaint, and the whole thereof, as though the said complaint was herein set forth at length in words and figures.

WHEREFORE, said cross-defendants pray that the cross-complainant have and recover nothing by reason of this action, and that cross-defendants have and recover from the cross-complainant all the relief prayed for in the complaint herein.

JOE CRIDER, Jr.,

Attorney for the Cross-defendant, Standard Accident Insurance Company of Detroit, a Corporation.

CROUCH & SANDERS,

Attorneys for L. DeWaard, H. DeWaard, and L. DeWaard, Jr., Cross-defendants and Plaintiffs, and said Cross-defendant.

State of California,
County of San Diego,—ss.

L. DeWaard, being by me first duly sworn, deposes and says:

I am one of the plaintiffs and cross-defendants, in the foregoing entitled action and know the contents of the answer to cross-complaint to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true.

L. DEWAARD.

Subscribed and sworn to before me, this 25th day of July, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California.

[Endorsed]: Filed Jul. 28, 1925. [92]

[Title of Court and Cause.]

ANSWER OF MARYLAND CASUALTY COMPANY.

Comes now the Maryland Casualty Company, a corporation, [93] cross-defendant, and for answer to the allegations contained in the answer and cross-complaint of the Union Oil Company of Arizona, a corporation, one of the cross-defendants in the above-entitled action does hereby admit all of the allegations contained in Paragraphs I, II and III of the cross-complaint of said Phoenix-Tempe Stone Company, a corporation, and does also admit that it is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Maryland, and is a surety company authorized to become surety upon bonds in the State of Arizona, but denies each and every other allegation of the cross-complaint of said Union Oil Company.

WHEREFORE, said cross-defendant having fully answered herein, prays that it may be dismissed with its costs.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,
Attorneys for Maryland Casualty Company.

[Endorsed]: Filed Apr. 16, 1926. [94]

[Title of Court and Cause.]

ANSWER OF CROSS-DEFENDANT, PRATT-GILBERT COMPANY, A CORPORATION. [95]

Comes now the Pratt-Gilbert Company, a corporation, one of the cross-defendants named in said above entitled and numbered cause, by its attorneys, James P. Lavin and M. L. Ollerton, and sets forth its claim as in said cross-complaint required as follows:

1.

That this cross-defendant did, between the 26th day of September, 1924, and the 14th day of November, 1924, sell and deliver to the cross-defendants, DeWaard & Sons, at their special instance and request, certain goods, wares and merchandise which are more particularly described in the account attached hereto and made a part of this answer and marked Exhibit "A."

2.

That said goods, wares and merchandise described

and set forth in the said account attached hereto, were of the reasonable value of $176.08 and that the cross-defendants, DeWaard & Sons, promised to pay therefor the said sum of $176.08; that the said sum of $176.08 became due and payable on the 14th day of December, 1924, but no part thereof has been paid.

3.

That each and every article described in the account attached hereto and marked Exhibit "A," were sold and delivered to the said cross-defendants, DeWaard & Sons, and were used by the said cross-defendants, DeWaard & Sons, for the making of certain improvement and for the doing of certain work upon a portion of the Prescott-Phoenix Highway, known as Federal Aid Project No. 72–A, and more particularly described in that certain contract between the Phoenix-Tempe Stone Company, a corporation, cross-complainants, and DeWaard & Sons, cross-defendants and set forth in the cross-complaint of the said cross-complainants on file [96] herein.

WHEREFORE, the cross-defendant, Pratt-Gilbert Company, a corporation, prays judgment that its claim herein described and set forth be established, and that it have judgment against the Phoenix-Tempe Stone Company, a corporation, cross-complainant herein, L. DeWaard, H. DeWaard and L. DeWaard, Jr., and Standard Accident Company, a corporation, cross-defendants herein, for the sum of $176.08 with interest thereon at the rate of six per cent per annum from the 14th day of Decem-

ber, 1924, until paid, for its costs herein expended, and for such other and further relief as may be just and equitable in the premises.

JAMES P. LAVIN,
M. L. OLLERTON.

State of Arizona,
County of Maricopa,—ss.

P. R. Helm, being by me first duly sworn, on oath deposes and says: That he is manager of Pratt-Gilbert Company, a corporation, one of the cross-defendants in the above entitled and numbered cause and makes this verification for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof; that the same are true in substance and in fact.

P. R. HELM,

Subscribed and sworn to before me this 28th day of July, 1925.

[Seal] M. L. OLLERTON,
Notary Public.

My commission expires September 1st, 1928.

[97]

EXHIBIT "A."

DeWaard & Sons,
Kirkland, Arizona.
Sept. 26th, 1924.

64# 7/8" Solid Drill Steel, 12.00 cwt.	7.68
2 oz. 3'–1/4" Sq. Flax Pump Pking	
5-oz. 4'3/8" Sq. Flax Pump Pking .35 lb.	.14
1 60–1/4" Bolt Punch 3.00 dz. .25–05%	.24

1	Bx 35–W. Alligator Lacing	3.40		45%	1.87
36	5/16x1 F. H. Elevator Bolts	3.00			
	1.08			40%	.65
2	Caps for Flat Boxes .05 ea				.10
6	¼x2 Mach. Bolts	1.80	.11		
6	¼x3 Mach. Bolts	2.00	.12		
6	⅜x2 Mach. Bolts	2.60	.16		
6	⅜x3 Mach. Bolts	3.00	.18	.57 30%	.40
6	½x3 Mach. Bolts	4.60	.18		
6	½x4 Mach. Bolts	5.20	.31		
6	½x6 Mach. Bolts	6.40	.38	.97 25%	.73

Sept. 3rd, 1924

2 Only	Side Plates Bearings for Type A. K. Webster Magneto				1.75
Postage					.08

Sept. 11th, 1924

3 Coils	#12 Blk Annealed Wire	4.85 ea.			14.55

Sept. 16th, 1924

1 Only	Vibrating Coil for Rex Mixer				4.00
2 Only	Hot Shots #A–151 4 or 5 Cells	2.38			4.76
21′ 9″	4″ Blk Pipe	62.30			13.55
1	4″ Blk Tees	8.45		65%	2.95
1	4″ Blk Plug	.42		24%	.31
1	4x3 Blk Bushing	.50		25%	.37
1	5″ Blk Coupling				2.06
1	4″ Blk Coupling				1.25
16	⅝x2½ Mach. Bolts	6.30–1.00–45–05%			
12	½x2½ Studs ¾″ Thd Ends	8.65.			.53
	1.04–40%				.62

1	18x6x2–1/8 C. F. S. S. Pulley	8.41
Sept. 23rd, 1924		
1	24x8x3¼ S. S. Pulley	11.80
November		
1	Pc. ⅜″ Screen 3′–Widex10′ long	6.60
November 14, 1924		
4′	4 20 Links of New #88 Link Chain .50	2.20
November 10th, 1924		
2½#	½″ Water Pump-Pking Sq Flax 36 lb.	.90
Postage		.10
October 2nd, 1924		
1	Concrete Edger ½″ Radius	.70
October 2nd, 1924		
3	Coils #12 Blk Wire 4.75 ea	14.25
3	Coils #16 Blk Wire 5.20 ea	15.60
October 29th, 1924		
2	Flat Box Bearings for 1–⅛″ Shaft .90 ea	1.80

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#2 DeWaard & Sons,
Kirkland, Arizona.

October 18th, 1924		
52½	Sq. ft. 1 pc. 7′x7′ 6¼″ Screen #10 Gauge Wire or Rotary Screen 1.05	55.13
	Total	$176.08

[Endorsed]: Filed Jul. 28, 1925. [99]

[Title of Court and Cause.]

ANSWER OF BASHFORD-BURMISTER CO.

Comes now the cross-defendant, Bashford-Burmister Company, a corporation, and in answer to the cross-complaint alleges, denies and admits as follows:

I.

Cross-defendant admits the allegations contained in paragraphs one, two, and three of the cross-complaint. [100]

II.

That as to the allegations contained in paragraph four of the cross-complaint, this cross-defendant has no knowledge or information upon which to form a belief and therefore denies the same.

III.

That as to the allegations contained in paragraph five of the cross-complaint, this cross-defendant admits that the Bashford-Burmister Company, a cross-defendant, did furnish material and property in connection with the work and improvements therein referred to at the instance and request and for the benefit of the said DeWaard & Sons.

As a further answer to the said cross-complaint, the said cross-defendant alleges:

I.

That between the first day of October, 1924, and the first day of December, 1924, this cross-defend-

ant sold and delivered to the plaintiffs, DeWaard & Sons, certain goods and material at the special instance and request of the said DeWaard & Sons and of the agreed value of $767.27; that an itemized statement of said goods and material so furnished is hereunto attached, marked Exhibit "A," and made a part of this complaint.

II.

That cross-defendant further alleges that all of the goods and materials furnished as hereinabove alleged, were furnished the said DeWaard & Sons to be used in the said work and improvements being performed by the said DeWaard & Sons as set out in paragraph two and three of the cross-complaint, and that the said goods and material were actually used in the said work and improvements.

III.

That no part of the amount due for the said goods and [101] material sold and delivered to the plaintiffs as hereinabove alleged has ever been paid and there is now due and owing to the cross-defendant, Bashford-Burmister Company, from the said plaintiffs, the sum of $767.27, with interest thereon from the first day of December, 1924, at 6 % per cent per annum.

WHEREFORE, this cross-defendant prays for judgment against the plaintiffs, DeWaard & Sons, and against the defendant, Phoenix-Tempe Stone Company, a corporation, and against the cross-defendant, Standard Accident Insurance Company of Detroit, a corporation, for the sum of $767.27,

with interest thereon at the rate of 6% per cent per annum from December first, 1924, and for its costs and disbursements herein.

NORRIS & NORRIS,

Attorneys for the Cross-defendant, Bashford-Burmister Company.

State of Arizona,
County of Yavapai,—ss.

James Whetstine, being first duly sworn, deposes and says: That *he Second* Vice-President and Secretary of the Bashford-Burmister Company, a corporation, cross-defendant herein, and makes this verification on its behalf; that he has read the foregoing answer, knows the contents thereof, and that the same is true except as to those matters stated on information and belief, and as to such matters he believes it to be true.

JAMES WHETSTINE.

Subscribed and sworn to before me this 28th day of July, 1925.

[Seal] P. H. MILLER,
Notary Public.

My commission expires June 23d, 1927. [102]

Oct. 1924

EXHIBIT "A."

2 sks spuds 4.33
1 sk sugar 8.95
2 5# tea 4.70
1 case eggs 14.50
1 case stg. beans 3.30
1 case peas 3.30
10# cheese 2.40
1—45# compound 9.25
25# prunes 3.00
25# seedless raisins 2.50
3 pc. Empire bacon 7.57
3 S. P. hams 12.68
5 5# W. J. B. coffee 12.00
25# pink beans 2.00
25# large white beans 1.88
25# dry onions ..... .97
10# lima beans ..... 1.47—94.80

Oct. 1924, 9th	1 dish pan	1.80	
	1 can opener	.30	
	1 meat fork	.15	
	2 spoons	.50	
	1 meat saw	.90	
	1 dipper	.40	
	1 flour sifter	.45	
	1 coffee boiler	2.95	
		7.45	
Oct. 1924, 10th.	Less 10%	.75	6.70
10th	1 sk. sugar	8.95	
	5# calumet baking powder	1.08	
	2# A & H soda	.20	
	1 Gr. black pepper	.37	
	1 — 2 oz. Grd. cinnamon	.07	
	1 — 2 oz. grd. ginger	.09	

1 — 2 oz. chili powder ..... .20
1 — 2 oz. ground mace ..... .21
1 — 2 oz. ground allspice ..... .07
10# can meal ..... .45
1 2-oz. van. extract ..... .30
25# salt ..... .60 — 12.59
1 case 2472 Eagle peas 3.30
1 case 2472½ stg. beans 3.30
1 case 2427½ spinach 4.10
1 case 2472 corn 3.50
1 case tall Lilly milk 4.60
1 case seeded raizins 4.00
1 case rolled oats 4.00
1 case cream of what 6.90
1 case 6710 apricots 3.00
1 case 6710 apples 3.25
1 case 6710 peaches 3.13

	1 case 2472½ M. H. tomatoes 3.20		
	1 case star soap 4.10		
	25# grd. coffee 9.75		
	1 gal. vinegar 1.00		
	25# cabbage 1.25		
	98# G. W. flour 4.50		
	1 can lard compound 8.25		
	1 sk. spuds 2.24		
	1 case 6/10 B. L. Karo syrup 4.03	— 81.40	
			195.49
	[103]		
Oct. 1924, 13th	3 sm. sheet iron heaters	10.50	
	1 case butter 13.50		
	1 case matches 8.50		
	1 case eggs 33.00		
	1 case pancake flour 3.35		
	1 case Lenox soap 3.70		

	2 cases chili powder ..... .70	
	20# salt ..... .50	
	1 only broom ..... .70	63.95
15th	1 box yeast foam xxxx	1.47
20th	1 cart. P. A. tobacco 3.06	
	3 cart. chesterfields 3.84	
	1 box cigars 3.60	
	1 98 G. M. 4.50	
	1 sk. sugar 8.95	
	1 sk. spuds 2.63	
	25# corn meal 1.04	
	25# pink beans 2.25	
	25# navy beans 2.42	
	25# grd. coffee 9.75	
	5# Calumet baking powder 1.07	
	1 case Argo corn starch 5.15	
	1 case tall Bordens milk 4.70	
	1 case 6110 blackberries 4.13	

1 case eggs	16.50	
10# butter	4.40	
20# prunes	2.70	
20# rice	1.70	
2—1# Liptons cocoa	.64	
5 pcs. Emp. bacon	11.59	
3 pc. hams	12.68	96.80
1 baking pan	2.00	
6 service dishes	5.70	
1 doz. cups and saucers	4.20	
1 doz. plates	2.70	
½ doz. knives and forks	3.45	
½ doz. teaspoons	.18	
	18.23	
Less 10 %	1.82	16.41

27th	25# grd. coffee	9.75
	1 sk. onions	3.61
	1 — 12 oz. lemmon extract	.65
	1 — 12 oz. van. extract	.65
	1# garlic	.25
	12 oz. chili powder	.85
	½ oz. cyenne	.50
	1 case M. H. tomatoes	3.20
	25# bx. maccaroni	2.60
	25# bx. spaghetti	2.60
	15# beans	6.60
	1 case 6/10 spinach	3.43
	15# sugar	1.80
	15# cocoanut	6.90
	1 pail jelly compound	3.00
	1 case 6/10 peaches	3.13
	1 case 6/10 apricots	3.00

	2 cases tall milk	9.40	61.92
	1 case P. A. tobacco		18.36
	3 syrup pitchers		1.50
	1½ gal. coffee pot	.65	
	1 2-gal. stew pot	.70	
	3 small wood stoves	10.05	
	25 jts. pipe 3#	5.00	
	12 5″ dampers	2.40	18.80
			495.70

[104]

Oct. 28th 31st.	1 doz. towels		1.80
	2 sks. sugar	17.79	
	2 sks. spuds	4.91	
	2 cases eggs	28.00	
	10# calumet	1.60	
	1 gal Wesson oil	1.82	
	4 2-oz. curry powder	.63	

	2 4-oz. paprica	.26	
	1/2# nutmeg	.50	
	1/2# grd. mustard	.30	
	13# L. H. cheese	3.64	39.56
	1 2-gal stew pot	1.65	
	1 2-gal. coffee pot	1.95	
	1 enameled plate	1.45	
	6 enameled cups	1.50	
	6 enameled saucers	1.20	
	6 enameled plates	2.40	10.15
Nov. 17	10# black tea	4.70	
	1 case 6/10 blackberries	4.13	
	1 L. H. cheese	3.60	
	1 24# yellow corn meal	1.05	
	25# salt	.60	
	2 — 5# calumet	2.13	
	3 sacks sugar	26.25	

	6 cases milk	28.20	
	1 case butter	13.76	
	3 cases 2412 corn	10.50	94.92
Nov. 19th.	3 sks. spuds	6.55	
	2 cases M. H. tomatoes	6.40	
	2 cases 6110 peaches	7.75	
	1 case cream of wheat	6.90	
	45# rolled oats	2.25	
	1 can lard compound	8.00	
	2 cases 6110 B. L. Karo syrup	8.06	
	2 hams	8.49	
	4 Emp. bacon	10.69	
	2 cases eggs	30.00	
	15# butter	6.45	101.54
	1 box cigars		3.60
			767.27

[Endorsed]: Filed Jul. 28, 1925. [105]

[Title of Court and Cause.]

ANSWER OF GUARDIAN TRUST COMPANY.

Comes now the cross-defendant, Guardian Trust Company, a corporation, by its attorneys, Armstrong, Lewis & Kramer, and for answer to the cross-complaint of Phoenix-Tempe Stone Company shows to the Court: [106]

I.

Admits that Guardian Trust Company is a corporation, duly organized under and by virtue of the laws of the State of Arizona, and having its principal place of business in the county of Maricopa, State of Arizona.

II.

The cross-defendant, Guardian Trust Company, a corporation, admits that it furnished services upon or in connection with said work and improvements as alleged in the cross-complaint of Phoenix-Tempe Stone Company, defendant and cross-complainant; denies that the claim of this cross-defendant is without right; denies that the claim of this cross-defendant constitutes no liability against said cross-complainant.

III.

Replying to the cross-complaint, the Guardian Trust Company, a corporation, shows to the Court that on the 29th day of May, 1924, the Guardian Trust Company issued its policy of insurance, No.

296238, a copy of which, together with all riders, renewals, binders and extensions thereof, is hereto attached and made a part hereof as fully as if set out herein at length, and marked Exhibit "A," wherein and whereby the Guardian Trust Company, cross-complainant, promised and agreed that it, the Guardian Trust Company, during the period of from May 29, 1924, to May 29, 1925, would indemnify and save harmless the plaintiffs and cross-defendants L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, of and from any loss by reason of the liability imposed upon the said last-named plaintiffs and cross-defendants by law for damages on account of injuries to the employees of the said plaintiffs [107] and cross-defendants resulting in injury and including death resulting therefrom.

IV.

That in consideration thereof the plaintiffs and cross-defendants, L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, promised and agreed therefor to pay to the Guardian Trust Company, cross-complainant, the sum of Two Hundred Fifty-eight and 85/100ths ($258.85) Dollars; that no part of same has been paid.

V.

Cross-defendant, Guardian Trust Company, a corporation, admits the execution and delivery to the said engineer of the State of Arizona, by

Phoenix-Tempe Stone Company, a corporation, as principal and Maryland Casualty Company, a corporation, as surety, of the two certain bonds set out in Paragraph II of the cross-complaint of Phoenix-Tempe Stone Company, a corporation; admits the execution and delivery by the said DeWaard & Sons as principal and cross-defendant, Standard Accident Insurance Company, a corporation, as surety, to Phoenix-Tempe Stone Company, of the bond described in Paragraph III of the cross-complaint.

WHEREFORE, Guardian Trust Company, cross-defendant, prays judgment against the plaintiffs, L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant, Maryland Casualty Company, a corporation, and Standard Accident Insurance Company, a corporation, cross-defendants, in the sum of Two Hundred Fifty-eight and 85/-100ths ($258.85) Dollars, [108] together with interest thereon at the rate of 6% per annum from the 29th day of May, 1924, until paid, together with cross-defendant's costs herein laid out and expended.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Cross-defendant, Guardian Trust Company. [109]

EXHIBIT "A."

Binder No. 101103

Policy No. U. C. 296238 Renewal of U. C. New—Not previously insured.

Agent ——

DECLARATIONS

Item 1. Name of Employer DeWaard & Sons, P. O. Address San Diego, California. The Employer is Co-partnership, (State whether individual, co-partnership, corporation, receiver or trustee.)

Item 2. The Policy term shall be from 12.01 A. M. May 29th, 1924 to 12.01 A. M. May 29th, 1925. standard time.

Item 3. Location of all Factories, Shops, Yards, Buildings, Premises, or other Workplaces of the Employer State of Arizona.

H. O. No. ——	Kind of Trade, Business, Profession or Occupation. (Manual Classification)	Estimated Payroll of Employees for Policy Period	Premium Rate per $100 of Employees Payroll	Estimated Advance Premium
	CONCRETE WORK—bridges, including piers or abutments. Payroll to include those engaged in making, setting up, and taking down forms, scaffolds, false work and concrete distributing apparatus. (5203)	20,000.00	7.28	
				DEPOSIT PREMIUM
	STATE or MUNICIPAL ROAD or STREET MAKING—including culverts not exceeding 10-ft. span. All operations including paving and surfacing but not including quarrying and blasting. (6042)	If any	2.23	$109.86
	BLASTING (6280)	If any	12.62	
	(8810)	If any	.05	
	Blasting Minimum 27.50			
	Clerical force—exclusively engaged in office duties. [110]			

The minimum premium for this Policy shall be $82.36 Deposit premium, $109.86.

Item 4. The estimated payroll as stated above includes the entire remuneration of whatsoever kind earned by all persons employed in the service of this Employer in connection with this Employer's trade, business, profession or occupation, as provided in Condition A, to whom remuneration of any nature in consideration of service, is paid, allowed or due, except the President, any Vice-President, Secretary, or Treasurer of a corporation not personally supervising the manual or mechanical processes covered by the Policy, whose remuneration is not included.

Item 5. Total expenditure for wages (excluding the remuneration of President, Vice-President, Secretary or Treasurer not personally supervising the manual or mechanical processes covered by this Policy) for the last calendar year ending December 31, 192— was $——

Item 6. No explosives will be made, stored or used on premises, except as follows: No exceptions.

Item 7. No corrosive chemicals will be used, except as follows: No exceptions

Item 8. No wrecking or demolition of structures will be done, except as follows: No exceptions

Item 9. No operations of any nature not herein disclosed will be conducted by the Employer, except as follows: None contemplated

Item 10. No employer's liability or workmen's compensation insurance has been cancelled by any company during the past three years, except as follows: No exceptions

Item 11. Insurance will be carried on all boilers, except as follows: No boilers

Broker or Sub-Agent Guardian Trust Co.
Phoenix, Arizona.
Brokerage ——

Checked by —— Approved at H. O. —— [111]

APPLICATION FOR WORKMEN'S COMPENSATION AND EMPLOYER'S LIABILITY POLICY.

MARYLAND CASUALTY COMPANY, BALTIMORE.

(Herein Called the Company.)

Does hereby agree with the employer named and described as such in the declarations hereinafter set forth and hereby made a part hereof, as respects personal injuries sustained by employees including death at any time resulting therefrom, as follows:

COMPENSATION.

I. To pay to the person and in the manner provided therein, any sum due or to become due from this employer because of any such injuries, including death resulting therefrom, under certain statutes cited and described in endorsements attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law. It is agreed that all of the provisions of each Workmen's Compensation Law cited and described in endorsements attached to this policy shall be and remain a part of this contract, as fully and completely as though written herein, so far as they apply to compensation while this policy shall remain in force, and all premiums provided by this policy, or by any endorsement hereon shall be fully earned whether any such Workmen's Compensation Law, or any part of any such, is now, or shall hereafter be, declared invalid or unconstitutional. This obligation for compensation shall include all provisions of the Workmen's Compensation Law respecting funeral expenses, medical, surgical, nurse and hospital services, medical or surgical apparatus or appliances or medicines. Nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited and described in an endorsement hereto attached.

LIABILITY.

II. To indemnify this Employer against loss by reason of the liability imposed upon this Employer

by law for damages on account [112] of such injuries, including death resulting therefrom.

SERVICE.

III. To serve this Employer (1) by the inspection of work-places set forth in the declarations whenever deemed necessary by the Company and thereupon to suggest to this Employer such charges and improvements as may operate to reduce the number and severity of personal injuries during work; and (2) upon notice of such injuries so sustained, by investigation thereof and by settlement of any resulting claims in accordance with the law.

DEFENSE.

IV. To defend in the name and on behalf of this Employer any suits or other proceedings which may at any time be instituted against this Employer on account of such injuries, including death resulting therefrom, including suits or other proceedings alleging such injuries or death and demanding damages or compensation therefor, although such suits, proceedings, allegations and demands are wholly groundless, false or fraudulent.

COSTS AND EXPENSES.

V. To pay all costs taxed against this Employer in any legal proceeding defended by the Company, all interest accruing after entry of judgment, and all expenses incurred by the Company for investigation, negotiations for settlements, or defense of claims or suits; further to pay the cost of such immediate surgical relief as is imperative at the time of an accident.

LOCATIONS COVERED.

VI. This Policy shall cover such injuries occurring (a) under insuring Clause One wherever they may occur; (b) under insuring Clause Two only at the locations described in the Declarations.

EMPLOYEES COVERED.

VII. This Policy shall cover such injuries, including death resulting therefrom, sustained by any employee or employees legally [113] employed by this Employer, engaged in or in connection with the trade, business, profession or occupation of this Employer, whose entire remuneration is included in the actual total annual remuneration determined as hereinafter provided, upon which total annual remuneration the premium for this Policy is to be adjusted, and such injuries, including death resulting therefrom, sustained by the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation, but the remuneration of any such officer may be excluded unless he personally supervises the manual or mechanical processes covered by this Policy.

POLICY PERIOD.

VIII. This Policy shall apply only to such injuries, including death, resulting therefrom, so sustained by reason of accidents occurring within the Policy period as limited and defined in Item 2 of the Declarations.

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:

BASIS OF PREMIUM.

Condition A. The premium is based upon the entire remuneration earned during the Policy period by all employees of this Employer, engaged in or in connection with the trade, business, profession or occupation of this Employer. If during the Policy period there shall be any change in or extension of the trade, business, profession or occupation of this Employer as set forth in the Declarations, the earned premium therefor shall be adjusted upon the basis of the entire remuneration paid for every such trade, business, profession or occupation at the Company's rate or rates, respectively, applicable thereto. No premium charge shall be made upon the remuneration of the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation, who does not personally supervise the manual or mechanical processes covered by this Policy. [114]

STATUTORY OBLIGATIONS.

Condition B. If the Workmen's Compensation Law of the state or states covered by this Policy provides that the Company shall be directly and primarily liable to employees or dependents of a deceased employee, or gives to an injured employee, or to his representative if death results, or to any board, commission, officer or other legally designated state agency in his or their behalf, the right to enforce a claim to compensation directly against the

Company; or declares that as to any such employee notice to or knowledge on the part of this Employer of the occurrence of the injury or death shall be notice to or knowledge of the Company; or shall provide that jurisdiction of this Employer obtained in any legal proceeding for the recovery of compensation shall be jurisdiction of the Company, which shall be bound by any order, finding, decision, award or judgment therein legally rendered against this Employer; or shall require that any such claim for compensation shall be a first lien upon any money which may become owing to this Employer on account of this Policy; or that the Company shall not be relieved from the payment of such compensation because of the insolvency or bankruptcy of this Employer; or shall declare that under any circumstances compensation shall be paid direct to any claimant by the Company; or shall declare that the Company shall promptly pay to the persons entitled to compensation, all installments of compensation that may be awarded or agreed upon; then any such statutory provision is made a part of this Policy and the relation between the Company and such injured employee or those claiming by, through or under him shall be as declared by such provision, but subject to the terms, provisions, limitations, and requirements of the Policy not inconsistent therewith.

READJUSTMENT OF PREMIUM RATES.

Condition C. If the Workmen's Compensation Law of any state or states covered by this Policy shall be declared invalid or [115] unconstitu-

tional, in whole or in part, by the judgment of the court of last resort, the premium rates provided by this Policy or any endorsement hereon, shall apply until the date of such judgment, and the Company shall immediately readjust the premium rates provided by this Policy so as to equitably reflect the changed conditions.

INSPECTION OF PLANT AND EXAMINATION OF BOOKS.

Condition D. The Company shall be permitted at all reasonable times to inspect the plants, works, machinery and appliances of this Employer; and to examine this Employer's books and records at any reasonable time during the Policy term or any extension thereof, or within one year after its final expiration, for the purpose of determining the actual premium earned while the Policy was in force.

NOTICE.

Condition E. Upon the occurrence of an accident this Employer shall give immediate written notice thereof to the Company or to its duly authorized agent with the fullest information obtainable. This Employer shall give like notice with full particulars of any claim made on account of such accident. If thereafter, any suit or other proceeding is instituted against this Employer, he shall immediately forward to the Company every summons, notice or other process served upon him. Nothing contained in paragraph B or elsewhere in this Policy shall relieve this Employer of his obligations with respect to the notice required by this condition.

SPECIAL STATUTES.

Condition F. If the method of serving notice of cancellation or the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which this Policy covers, such specific statutory provision shall supersede any such condition in this Policy inconsistent therewith. [116]

ASSIGNMENT.

Condition G. No assignment or change of interest under this Policy shall bind the Company unless its consent shall be endorsed hereon or attached hereto signed by a duly authorized officer of the Company.

SUBROGATION.

Condition H. In case of the payment of loss or expense under this Policy, the Company shall be subrogated to all the rights of this Employer or any employee or dependent covered hereby to the extent of such payment and this Employer shall execute all papers required and shall co-operate with the Company to secure such rights.

CANCELLATION.

Condition J. This Policy may be canceled at any time by either of the parties upon ten days' written notice to the other party, stating when thereafter cancellation shall be effective, and the date of cancellation shall then be the end of the Policy period. If any statutes in any state in which this Policy covers shall so require, similar notice of cancellation

shall, at the same time, be sent by the party giving it to any board, commission, officer or other authorized agency of such state designated by such statute for that purpose. The earned premium shall be computed upon the basis of the entire remuneration to date of cancellation. If such cancellation is at the Company's request or at this Employer's request when actually retiring from the trade, business, profession or occupation herein described, the earned premium shall be computed as provided in Condition A, and adjusted *pro rata.* If such cancellation is at this Employer's request and he is not retiring from the trade, business, profession or occupation herein described, the earned premium shall be computed as provided in Condition A, and adjusted at short rates in accordance with the table printed hereon, but such short [117] rate premium shall not be less than the minimum premium stated in the Declarations. Notice of cancellation mailed to the address of this Employer herein given shall be a sufficient notice and the check of the Company, similarly mailed, a sufficient tender of any unearned premium.

CHANGES IN POLICY.

Condition K. No condition or provision in this Policy shall be waived or altered except by endorsement hereon or attached hereto signed by a duly authorized officer of the Company. [118]

COMP–29

ARIZONA COMPENSATION ENDORSEMENT.

(Which shall only be effective on and after the date hereof.)

Date May 29th, 1924.

It is Hereby Understood and Agreed, that the Arizona Workmen's Compensation Act, and all additions thereto, and amendments thereof, is a Workmen's Compensation Law within the meaning of Insuring Clause One of the Policy to which this Endorsement is attached.

In Consideration of the premium rate at which this Policy is written, and subject to all its other terms, conditions, limitations and agreements not inconsistent herewith, it is understood and agreed that the insolvency or bankruptcy of the Assured shall not release the Company from liability for injuries sustained or loss occasioned during the life of the Policy, and in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the Policy by the injured person, or his or her heirs against the Company.

It is further understood and agreed, that the Company's liability under Insuring Clause Two for an accident resulting in personal injuries, including death resulting therefrom, to one employee is limited to Five Thousand and no/100 Dollars ($5,000.00), and subject to the same limit for each employee, the Company's total liability for loss from an accident resulting in personal injuries, including death resulting therefrom to more than one em-

ployee is limited to Ten Thousand and no/100 Dollars ($10,000.00).

It is further understood and agreed that the provisions of the second and third paragraphs of this Endorsement apply to the attached Policy only in the State of Arizona. [119]

Subject to the terms, limits and conditions of the Policy.

Attached to and forming part of Workmen's Compensation and Employer's Liability Policy No. UC–296238, issued by the Maryland Casualty Company, of Baltimore, Md., to DeWaard & Sons of San Diego, State of California.

Not valid until countersigned by a General Agent of the Company.

PHOENIX SAVINGS BANK & TRUST COMPANY.

By ————————————,

General Agent.

F. HIGHLANDS BURNS,

President. [120]

GEN. CAS. 1

ENDORSEMENT.

(Which shall only be effective on and after date hereof.)

Date May 29th, 1924.

IN CONSIDERATION of the rate at which this policy is written, it is hereby understood and agreed that the company will furnish at its own cost and expense such medical, surgical, hospital and ambulance services as shall be necessary for any injury

sustained by employees of the assured and covered by the terms of the Policy.

Nothing herein contained shall vary, alter, amend or change the Policy as originally written, other than as expressly stated above.

Attached to and forming part of —— Policy No. UC–296238, issued by the Maryland Casualty Company, of Baltimore, Md., to DeWaard & Sons of San Diego, State of California.

Not valid until countersigned by

PHOENIX SAVINGS BANK & TRUST COMPANY.

By ————————,

General Agent.

F. HIGHLANDS BURNS,

President. [121]

ENDORSEMENT.

FARMING RISKS.

Date May 29th, 1924.

IT IS HEREBY UNDERSTOOD AND AGREED, in consideration of the rates at which this Policy has been issued, that if any of the operations are being conducted at a point more than six (6) miles from a town or village having a resident physician or surgeon, the Assured mentioned below agrees to reimburse the Company upon demand for the cost of transportation of any injured employee or employees to the doctor, or surgeon, or place necessary to provide medical attention, and/or for the cost of transportation of the doctor, or other

medical or surgical assistance to the injured employee or employees.

Subject otherwise to all the terms, limits and conditions of the Policy.

Attached to and forming part of Compensation Policy No. UC–296238, issued by the Maryland Casualty Company, of Baltimore, Md., to DeWaard & Sons of San Diego, State of California.

Not valid until countersigned by

PHOENIX SAVINGS BANK & TRUST COMPANY.

By ————————,

General Agent.

F. HIGHLANDS BURNS,

President. [122]

In Consideration of the premium for which this Policy is written, it is understood and agreed, subject to all the terms, limits and conditions of the Policy, that the premium ($109.86) named in the Policy is a deposit premium, and that on the 1st of each month during the Policy period the Assured will render to the Company a pay-roll report showing the exact and entire expenditure of wages for the work covered by the Policy for the —— month preceding such statement, and will immediately pay the Company the premium earned, calculated on said pay-roll report at the rate or rates named in the Policy.

It is further understood and agreed that the $95.10 deposit premium shall be held by the Company and applied to the last pay-roll statement rendered by the Assured.

Attached to and forms part of Policy No. UC–296238 of the Maryland Casualty Company, issued to DeWaard & Sons, San Diego, California.

PHOENIX SAVINGS BANK & TRUST COMPANY.

By ————————,
General Agent.

F. HIGHLANDS BURNS,
President.

[Endorsed]: Filed Jul. 29, 1925. [123]

[Title of Court and Cause.]

ANSWER AND CROSS-COMPLAINT OF UNION OIL COMPANY OF ARIZONA, A CORPORATION.

Comes now the above-named cross-defendant, Union Oil Company of Arizona, a corporation, and for its answer to the cross-complaint of the Phoenix-Tempe Stone Company, a corporation, and for cross-complaint against said Phoenix-Tempe Stone [124] Company, a corporation, and Maryland Casualty Company, a corporation, and L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm name and style of DeWaard & Sons, alleges and says:

I.

That the Maryland Casualty Company is a corporation duly organized, existing and doing busi-

ness under and by virtue of the Laws of the State of Maryland and is, and was, at all times hereinafter mentioned, a surety company authorized to become surety upon bonds in the State of Arizona.

II.

That this cross-defendant and cross-complainant admits all of the allegations as contained in paragraphs I, II and III of the cross-complaint of said Phoenix-Tempe Stone Company, a corporation, and hereby adopts each and every word, allegation and exhibit as therein contained as its own to the same extent and purpose as though set out therein at length.

III.

That this cross-defendant and cross-complainant denies the allegations contained in paragraph V of the cross-complaint of said Phoenix-Tempe Stone Company, a corporation, in so far as same relates to this cross-defendant, except as hereinafter admitted, explained or modified.

IV.

That between the 1st day of October, A. D. 1924, and the 5th day of December, A. D. 1924, both of said dates inclusive, this cross-defendant, Union Oil Company of Arizona, a corporation, sold and delivered to said L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm style and name of DeWaard & Sons, certain [125] goods, wares and merchandise, to wit: Gasoline, lubricating oil, grease and iron containers, in the sum of Four

Hundred Sixty-seven and 08/100 ($467.08) Dollars, which said sum has not been paid save and except a credit of Nine ($9.00) Dollars, and no more.

That there is now due, owing and unpaid from said L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm style and name of DeWaard & Sons, the sum of Four Hundred Fifty-eight and 08/100 ($458.08) Dollars.

V.

That the said sum of Four Hundred Fifty-eight and 08/100 ($458.08) Dollars is a reasonable and the agreed value of said goods, wares and merchandise so sold and delivered by said Union Oil Company of Arizona, a corporation, to said L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm style and name of DeWaard & Sons.

VI.

That all of said goods, wares and merchandise sold and delivered by said Union Oil Company of Arizona, a corporation, to said L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm style and name of DeWaard & Sons, was furnished for and used in, for, on or about, and in connection with said work, improvement, and contract referred to in the cross-complaint of the Phoenix-Tempe Stone Company, a corporation, being for the construction of a certain highway known as the Phoenix-Prescott Highway, Federal Aid Project No. 72–A. [126]

WHEREFORE, this cross-defendant and cross-complainant, Union Oil Company of Arizona, a corporation, prays

I.

That said Maryland Casualty Company, a corporation, be summoned and required to appear herein and answer or admit the allegations as herein contained.

II.

That it have judgment against the Phoenix-Tempe Stone Company, a corporation, Maryland Casualty Company, a corporation, and L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals, and as copartners doing business under the firm style and name of DeWaard & Sons, in the sum of Four Hundred Fifty-eight and 08/100 ($458.08) Dollars, for the costs of this action and for such other and further relief as may be just and equitable in the premises.

COONEY & KELLEY,

Attorneys for Cross-Defendant and Cross-Complainant, Union Oil Company of Arizona, a Corporation. [127]

State of California,
County of Los Angeles,—ss.

J. M. Rust, being first duly sworn, on oath says: That he is Assistant Treasurer of the Union Oil Company of Arizona, a corporation, the cross-defendant and cross-complainant in the foregoing and above-entitled action; that he has read the within answer and cross-complaint and knows the contents thereof; and that the same is true of his own

knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

J. M. RUST.

Subscribed and sworn to before me this 23d day of July, A. D. 1925.

[Seal] MAY A. PARKER,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Jan. 25, A. D. 1929.

[Endorsed]: Filed Jul. 25, 1925. [128]

[Title of Court and Cause.]

ANSWER OF CROSS-DEFENDANT ARIZONA GROCERY COMPANY. [129]

Comes now the Arizona Grocery Company, a corporation, cross-defendant in the above-entitled action, and answering unto the cross-complaint of the Phoenix-Tempe Stone Company admits, denies and alleges as follows:

I.

Admits paragraphs I, II and III.

II.

Cross-defendant is without knowledge, information or belief sufficient to enable it to determine the truth of the allegations of cross-complaint contained in paragraph IV, and asks that such cross-complainant be put to strict proof thereof.

III.

Answering unto paragraph V of said cross-complaint, this cross-defendant admits it has, and claims to have furnished materials and property upon or in connection with said work, and improvement at the instance and request of said DeWaard & Sons, plaintiffs; and denies that said claims of this cross-defendant are without right and constitute no liability against said cross-complaint; and in this connection this cross-defendant alleges that between June 18, 1924, and December 5, 1925, both dates inclusive, this cross-defendant, at the instance and request of plaintiffs, furnished them in connection with said work and improvements, materials and property in the aggregate amount of Twenty-six Hundred and Eighty and Forty-five One-hundredths Dollars ($2,680.45), and that such materials and property were of the value of said sum of $2,680.45; and that no part of said sum of $2,680.45 has been paid to this cross-defendant except sums aggregating $1,836.93, waiving a balance of Eight Hundred Forty-three and Fifty-three One-hundredths Dollars ($843.53) due, payable and unpaid from plaintiffs and cross-complainant to this cross-defendant. [130]

WHEREFORE, this cross-defendant prays that it may have judgment against said cross-complainant in the sum of $843.53, together with legal interest thereon from January 1, 1925, and for such

other and further general relief as to the Court may seem equitable in the premises.

ELLIOTT & SWENSON,
Attorneys for Cross-defendant, Arizona Grocery Company.

State of Arizona,
County of Maricopa,—ss.

Lloyd C. Lakin, being first duly sworn, deposes and says:

That he is the secretary of the Arizona Grocery Company, one of the cross-defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to those matters alleged to be upon information and belief, and as to those he deposes that he believes them to be true.

LLOYD C. LAKIN.

Subscribed and sworn to before me this 28th day of July, 1925.

My commission as notary expires June 17, 1927.

[Seal] MARY KAVANAUGH,
Notary Public in and for Maricopa County, State of Arizona.

[Endorsed]: Filed Jul. 29, 1925. [131]

[Title of Court and Cause.]

ANSWER OF MOTOR SUPPLY COMPANY, A CORPORATION, TO CROSS-COMPLAINT. [132]

Now comes Motor Supply Company, a corporation, one of the cross-defendants named in the cross-complaint filed in the above-entitled action and for answer to said cross-complaint alleges as follows:

I.

That this cross-defendant is and at all times mentioned herein and in the cross-complaint was a corporation organized and existing under and by virtue of the laws of the State of Arizona and engaged in the business of selling goods, wares and merchandise in said state.

II.

Admits the allegations of paragraph II of the cross-complaint.

III.

Admits that this cross-defendant has furnished materials and property to cross-defendants, DeWaard & Sons, in connection with said work and improvements specified in the cross-complaint, and in the performance thereof at the instance and request of said DeWaard & Sons, and alleges that it has not been paid therefor and that it asserts and has a valid, legal and existing claim and demand therefor in the sum of $159.38, after allowing all payments and offsets and that its said claim

and demand constitute a liability against cross-complainant under its contract with the State Engineer and its bond for the performance thereof alleged in the cross-complaint, and in this behalf this cross-defendant alleges that it has attached hereto and makes part hereof an itemized statement of its said claim and demand and all credits thereon verified by the oath of this cross-defendant's agent, and that each of the items [133] of said demand was purchased by said DeWaard & Sons for use in, and was used in, the said work and improvement, and in the performance thereof and that the said sum of $159.38 is due and the same has never been paid nor has any part thereof ever been paid.

WHEREFORE, this cross-defendant prays that in the judgment to be rendered in this action it have judgment against cross-defendants, L. DeWaard, H. DeWaard and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, and against the cross-complainant for said sum of $159.38, and for its costs herein expended, and for such other and further relief as to the Court shall seem meet.

J. EARLY CRAIG,
Attorney for Cross-defendant, Motor Supply Company.

State of Arizona,
County of Maricopa,—ss.

L. H. Osburn, being first duly sworn, deposes and says:

That he is an officer, to wit, secretary and treasurer of Motor Supply Company, a corporation, the

cross-defendant named in and answering in, the foregoing answer to cross-complaint; that he has read the foregoing answer to cross-complaint and the same is true, except as to those matters [134] therein stated on information and belief and as to those matters he believes it to be true.

L. H. OSBURN.

Subscribed and sworn to before me this 28 day of July, A. D. 1925.

[Notarial Seal] W. A. WOOD.

My commission expires 2/11/29. [135]

MOTOR SUPPLY CO.
Automobile Equipment.
315–317 North Central Avenue.

Sold to DEWAARD & SONS,
Kirkland, Ariz.

Phoenix, Arizona, June 18, 1925.

Date Inv. No.		#1.	Debits	Credits
3919	9– 4–24	1 AK Webster Mag #67124	10.48	
		2 Webster springs	.24	
		1 #15 Jeff coil	1.66	
		1 set 1921 Dodge gen. brushes	.68	
		3 5 wire looms ford	1.44	
4613	9–17–24	2 dodge plugs	1.60	
		1 batt cable	.95	
		1 835 belt	.60	
		1 segment for dist.	.64	
		1 #11 gasket	.42	
		1 loom for starter ford	.72	

Date Inv. No.			Debits	Credits
		1 1921 ford steel dash	2.35	
		4 ford valves	.48	
		1 4 oz clover comp	.40	
		1 lb wire solder	.48	
		1 ½″ SAE Tap	.56	
		1 5/16 SAE Tap	.40	
		Postage and insurance	.29	
4986	9–24–24	2 Dodge valves	1.92	
		4 dodge pistons	10.72	
		4 dodge pins	1.60	
		2 #23 vell gaskets	.16	
		1 #24 vell gasket	.16	
		1 Dodge key for oil pump shaft	.05	
		4 5/16x1 SAE cap sc	.16	
		2 ft. R. C. Sec spk plug wires	.15	
		1 Bx rivets for brake lining	.17	
		80″ 2¼x3/16 Raybestos	3.33	
		60″ 1¾x3/16 Raybestos	2.00	

Date	Inv. No.		Debits	Credits
		2 sticks belt dressing	.80	
		12 H S Blades	.96	
		16 3⅞x3/16 step rings	2.40	
		C R D—F W D	48.97	
		#2. B R T—F W D	48.97	
	4986 9–24–24	1 Brush & spring Dodge Dist.	.16	
		1 ½ bottom tap.....	.56	
		1 5/16 bottom tap	.40	
	9–25–24	3 5 wire looms retd. Inv. B 3919 9–4–24		1.44
		1 ½ SAE Tap retd Inv. B 4613 9–17–24		.56
		1 5/16 SAE Tap retd Inv. B 4613 9–17–24		.40
	10–2–24	Credit for Pistons retd Inv. B 4986 9–24–24		12.92

Inv. No.	Date		Debits	Credits
5514	10– 4–24	1 33x4 FS Cord	18.56	
		2 33x4 red tubes	5.48	
		1 rim 1920 dodge	3.80	
		2 30x3½ FS Reg cords	18.16	
		2 do red tubes	3.75	
		Postage and insurance	1.03	
		[136]		
5706	10– 8–24	9′ 3″ 3½x¼ Thermoid	10.56	
		1 new style for loom	.80	
		6 C X Plugs	2.88	
		1 shalers 5 Min vule	1.20	
		postage and insurance	.16	
5950	10–13–24	2 33x4 FS Cords	37.12	
		2 do red tubes	4.48	
		2 ford coils	2.56	
		2 3377 cork gaskets	.12	
		1 3363 gelt gasket	.04	

Inv. No. / Date			Debits	Credits
		1 set scand lining	1.80	
		1 6018 speed wrench	.76	
		1 flywheel wrench	.56	
		1 qt shellac	1.20	
		postage and insurance	.80	
6040	10–14–24	4 sparker points	.16	
		3 mica washers	.12	
		1 tripee spring	.08	
		postage and insurance	.08	
		CRD F W D	166.35	15.32
		#3	166.35	15.32
6340	10–20–24	1 ford trans band clamp	.19	
		1 lb med clover comp	1.20	
		1 443 timken cone	4.16	
		postage and insurance	.11	

Inv. No.	Date		Debits	Credits
6709	10–27–24	1 1461 hot shot	2.32	
		1 ford rear gen brg	1.32	
		postage and insurance	.18	
	10–29–24	1 443 timken cone retd Inv. B 6340 10–20–24		4.16
7039	11– 1–24	1 341 Timken RA	2.87	
		postage and insurance	.16	
			178.86	19.48
			159.38	

State of Arizona,
County of Maricopa,—ss.

L. H. Osburn, being sworn deposes and says:

That he is agent, to wit, secretary and treasurer, of Motor Supply Company, cross-defendant in the within action; that the account of said cross-defendant with DeWaard & Sons, Inc., attached hereto is within the knowledge of affiant just and true and that it is due, and that all just and lawful offsets, payments and credits have been allowed.

L. H. OSBURN,
Affiant.

Subscribed and sworn to before me this 22d day of July, 1925.

W. A. WOOD,
Notary Public.

My commission expires 2/11/29.

[Endorsed]: Filed Jul. 28, 1925. [138]

[Title of Court and Cause.]

ANSWER AND CROSS-COMPLAINT OF WESTERN PIPE AND STEEL COMPANY OF CALIFORNIA.

Comes now the Western Pipe & Steel Company of California, a corporation, one of the cross-defendants in the above-entitled [139] action, by

its attorneys, John R. Hampton and D. V. Mulhern, and for answer to the cross-complaint of Phoenix-Tempe Stone Company, a corporation, and by way of cross-complaint against said Phoenix-Tempe Stone Company, Maryland Casualty Company, a corporation, L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals and as copartners, transacting business under the firm name and style of DeWaard & Sons, states:

I.

That it is a corporation, duly organized and existing under the laws of the State of California and authorized to transact business in the State of Arizona. That the Maryland Casualty Company is a corporation, duly organized under the laws of the State of Maryland and authorized to become surety upon bonds in the State of Arizona.

II.

That it admits the allegations contained in paragraphs I, II and III of said cross-complaint and adopts each and every one of such allegations and exhibits thereto as its own to the same extent and purpose as though set out at length herein.

III.

That it admits that it has furnished materials, labor and services for, upon or in connection with the work and improvements referred to in said cross-complaint, but denies that its claim therefor is without right and constitutes no liability against the cross-complainant, Phoenix-Tempe Stone Company.

IV.

That between the 19th day of June, 1924, and the 15th day of September, 1924, both dates inclusive, it sold and delivered to L. DeWaard, H. DeWaard and L. DeWaard, Jr., individually and as copartners, transacting business under the firm name and [140] style of DeWaard & Sons, at their special instance and request goods, wares, services and merchandise of the agreed value of $1,834.00, consisting of the following items, to wit:

"1924

Jun. 19	¼" Cylinders	875.00
Jul. 17	Repair Casting	9.75
Sep. 6	¼" Cylinders	875.00
Sep. 9	Rock Drag	21.50
Sep. 9	Rock Screen	12.25
Sep. 15	Corrg. Galv. Tank	40.50
		1834.00"

That all of said goods, wares, merchandise and services were furnished for and used in, about or in connection with the work, improvement and contract referred to in the cross-complaint of Phoenix-Tempe Stone Company, being for the construction of that certain highway known as the Phoenix-Prescott Highway, Federal Aid Project No. 72–A, it being understood and agreed that said goods, wares, merchandise and services were to be paid for in cash upon delivery and if not so paid said amounts were to bear interest at the rate of eight per cent per annum from said dates. That no part of said sum of $1,834.00 has been paid and there is

now due and owing to it, the sum of $1,834.00, with interest thereon at the rate of eight per cent per annum from and after the dates of delivery of the items as hereinbefore set out.

WHEREFORE, it prays:

1. That Maryland Casualty Company, a corporation, be summoned and required to appear and answer the allegations herein.

2. That it have judgment against L. DeWaard, H. DeWaard and L. DeWaard, Jr., as individuals and as copartners transacting business under the firm name and style of DeWaard & Sons, Phoenix-Tempe Stone Company, a corporation, and Standard Accident Insurance Company, a corporation, for the sum of $1,834.00, with interest at the rate of eight per cent per annum on the amounts due for the [141] respective items therein, from and after the dates of delivery of such items, for its costs of suit and for such other and further relief as may be just and mete in the premises.

JOHN R. HAMPTON,
D. V. MULHERN,
Attorneys for Western Pipe & Steel Company of California.

District of Arizona,
County of Maricopa,—ss.

A. A. Burden, being first duly sworn, on his oath deposes and says: That he is the Arizona manager of the Western Pipe & Steel Company of California, a corporation; has read the foregoing answer of said corporation, knows the contents thereof and

that the same are true, save and except the matters therein stated on information and belief, and that as to those matters, he believes *believes* same to be true.

A. A. BURDEN.

Subscribed and sworn to before me at Phoenix, Maricopa County, Arizona, this 12th day of August, 1925.

[Notarial Seal] D. V. MULHERN,
Notary Public.

My commission expires July 6, 1927.

[Endorsed]: Received Copy of Within Answer and Cross-complaint this 12th Day of August, 1925. Kibbey, Bennett, Gust, Smith & Lyman, Attys. for Defendant, Phoenix-Tempe Stone Company.

[Endorsed]: Filed Aug. 12, 1925. [142]

[Title of Court and Cause.]

AMENDMENT TO ANSWER AND CROSS-COMPLAINT (OF WESTERN PIPE & STEEL COMPANY OF CALIFORNIA).

Comes now the Western Pipe & Steel Company of California, one of the cross-complainants in the above-entitled action, and amends its answer and cross-complaint heretofore filed by adding to subdivision II thereof, on the second page of same and after the word "herein," in said subdivision, the following:

That on or about the 17th day of May, 1924, at Phoenix, Arizona, the cross-complainant, Phoenix-Tempe Stone Company, entered into a contract with the State Engineer of the State of Arizona, as such State Engineer and not individually, whereby said Phoenix-Tempe [143] Stone Company, for a valuable consideration, agreed to construct a certain highway in the State of Arizona, known as the Prescott-Phoenix Highway, Federal Aid Project No. 72–A. That coincident with the execution of said contract and as a condition precedent thereto, said Phoenix-Tempe Stone Company, as principal and Maryland Casualty Company, as surety, executed and delivered to said State Engineer of the State of Arizona a bond in the penal sum of $80,884.57, wherein it is provided:

> "NOW THEREFORE, if the said contractor to whom said contract was awarded, or any assigns of his, or any sub-contractor under said contract, fails to pay all moneys due or to become due for or on account of any materials or property so furnished in the said work or improvement, or the performance thereof, or for any work, labor or services done thereon or furnished therefor, the said surety will pay the same to an amount not exceeding the sum hereinabove specified.
>
> This bond shall inure to the benefit of any and all persons, companies, or corporations who may have claims against such contractors, or any sub-contractor under said contract, for

or on account of labor or services performed, or material or property furnished for, or used in the said work or improvement, or the performance thereof as provided by the laws of Arizona."

That thereafter, on or about the 27th day of May, 1924, the cross-defendants, L. DeWaard, H. DeWaard and L. DeWaard, Jr., copartners, transacting business under the firm name and style of DeWaard & Sons, entered into a contract with said Phoenix-Tempe Stone Company, whereby said DeWaard & Sons, for a valuable consideration, agreed to construct a portion of said highway as provided in said contract between said Phoenix-Tempe Stone Company and said State Engineer of the State of Arizona.

Western Pipe & Steel Company of California further amends its answer and cross-complaint, in the prayer thereof, so that said prayer shall read as follows:

WHEREFORE, it prays:

1. That said Maryland Casualty Company, a corporation, be summoned and required to appear and answer the allegations herein. [144]

2. That it have judgment against L. DeWaard, H. DeWaard, and L. DeWaard, Jr., as individuals and as copartners transacting business under the firm name and style of DeWaard & Sons, Phoenix-Tempe Stone Company, a corporation, Standard Accident Insurance Company, a corporation, and Maryland Casualty Company, a corporation, for the sum of $1,834.00, with interest thereon at the rate

of eight per cent per annum on the amounts due for the respective items therein, from and after the dates of delivery of such items, for its costs of suit and for such other and further relief as may be just and *mete* in the premises.

D. V. MULHERN,

Attorney for Western Pipe & Steel Company of California.

[Endorsed]: Filed Mar. 26, 1926. [145]

[Title of Court and Cause.]

ANSWER OF HEAD LUMBER CO.

Comes now the cross-defendant, Head Lumber Company, a corporation, and in answer to the cross-complaint alleges, denies and admits as follows:

I.

Cross-defendant admits the allegations contained in paragraphs one, two, and three of the cross-complaint. [146]

II.

That as to the allegations contained in paragraph four of the cross-complaint, this cross-defendant has no knowledge or information upon which to form a belief and therefore denies the same.

III.

That as to the allegations contained in paragraph five of the cross-complaint, this cross-defendant admits that the Head Lumber Company, a cross-defendant, did furnish construction material

and property in connection with the work and improvements therein referred to at the instance and request and for the benefit of the said DeWaard & Sons.

IV.

As a further answer to the said cross-complaint, the said cross-defendant alleges:

That between the first day of October, 1924, and the first day of December, 1924, this cross-defendant sold and delivered to the plaintiffs, DeWaard & Sons, certain goods and material at the special instance and request of the said DeWaard & Sons and of the agreed value of $356.58; that an itemized statement of said goods and material so furnished is hereunto attached, marked Exhibit "A," and made a part of this complaint.

V.

The cross-defendant further alleges that all of the goods and material furnished as hereinabove alleged, were furnished the said DeWaard & Sons to be used in the said work and improvements being performed by the said DeWaard & Sons as set out in paragraphs two and three of the cross-complaint, and that the said goods and material were actually used in the said work and improvements.

VI.

That no part of the amount due for the said goods and [147] material sold and delivered to the plaintiffs as hereinabove alleged has ever been paid and there is now due and owing to the cross-defendant, Head Lumber Company, from the said

plaintiffs, the sum of $356.58 with interest thereon from the first day of December, 1924, at 6 per cent per annum.

WHEREFORE, this cross-defendant prays for judgment against the plaintiffs, DeWaard & Sons, and against the defendant, Phoenix-Tempe Stone Company, a corporation, and against the cross-defendant, Standard Accident Insurance Company of Detroit, a corporation, for the sum of $356.58 with interest thereon at the rate of 6 per cent per annum from December first, 1924, and for its costs and disbursements herein.

NORRIS & NORRIS,

Attorneys for the Cross-defendant Head Lumber Company [148]

State of Arizona,
County of Yavapai,—ss.

O. F. Orthel, being first duly sworn, deposes and says: That he is the president of the Head Lumber Company, a corporation, cross-defendant herein, and makes this verification on its behalf; that he has read the foregoing answer, knows the contents thereof, and that the same is true except as to those matters stated on information and belief; and as to such matters, he believes it to be true.

O. F. ORTHEL.

Subscribed and sworn to before me this 28th day of July, 1925.

[Notarial Seal] HERNDON J. NORRIS,
Notary Public.

My commission expires Dec. 18, 1928. [149]

June 13;

EXHIBIT "A."

DeWaard & Sons,
To Head Lumber Company Dr.
Prescott, Arizona.

(Construction material furnished for use on Federal Aid Project 72–A.)

1924.					
June 13;					
4 4x4–10 Com. Ro.		53′			
3 4x4–14 Com. Ro.		56			
10 4x4–16 Com. Ro.		213			
6 4x4–18 Com. Ro.		144	466″	@ 43¾¢	22.13
12 2x12–16 Com. Ro.		384			
16 2x12–12 Com. Ro.		384	768′	@ 42.00	32.25
10 2x6–16 Thin		160			
20 2x4–16 Com. Thin		213	373′	@ 41.00	15.29
50 1x8–14 Com.	i	467			
50 1x8–16 Com.		533	1000′	@ 41.00	41.00

1 Kg. 20D Common Nails)			@	5.50	5.50	
1 Kg. 6D Common Nails	2		@	6.10	6.10	$122.27
June 24;						
15# 16-Ga. Wire			@	.08½	1.28	
87# 14-Ga. Wire			@	.08	6.96	
20 2x4-12 #1 Com. N. P.	160′					
20 2x4-16 #1 Com. N. P.	213					
10 2x6-16 #1 Com. N. P.	160	533′	@	41.00	21.85	
1x6 Sheeting 3/12 11/10 55/8 14/14 90/16		1111′	@	41.00	45.55	
						$ 75.64
July 12;						
30 2x4-12 #1 Com. Full .	240′		@	.04½	10.80	
115 2x4-14 #1 Com. Thin	1073′					
30 2x6-16 #1 Com. Thin	480′	1553′	@	41.00	63.67	
4 Pcs. 2′ 4″ Sewer Pipe		(8)		.27	2.16	
16 Pcs. 2′ 3″ Sewer Pipe		(32)	@	.22	7.04	$ 83.67

August 13;

30 Pcs. 2x12–12	O. P.	720	@	.053¾	41.40	
10 Pcs. 4x6 –20	20 Com. Ro.	400	@	.05	20.00	
30 Pcs. 2x4 –16	Thin	320	@	.041¼	13.60	$75.00
						$356.58

[Endorsed]: Filed Jul. 29, 1925. [150]

[Title of Court and Cause.]

ANSWER OF McGRATH MULE CO.

Comes now the cross-defendant, McGrath Mule Company, a corporation, and in answer to the cross-complaint alleges, denies and admits as follows:

I.

Cross-defendant admits the allegations contained in paragraphs one, two, and three of the cross-complaint.

II.

That as to the allegations contained in paragraph four of the cross-complaint, this cross-defendant has no knowledge or information upon which to form a belief and therefore denies the same. [151]

III.

That as to the allegations contained in paragraph five of the cross-complaint, this cross-defendant admits that the McGrath Mule Co. did furnish property and perform labor in connection with the work and improvements therein referred to at the instance and request and for the benefit of the said DeWaard & Sons.

IV.

That between the first day of July, 1924, and the 11th day of December, 1924, this cross-defendant did furnish the plaintiffs, DeWaard & Sons, the use of certain mules and wagons at the special instance and request of the said DeWaard & Sons and at the agreed value of $577.71, and that an

itemized statement showing the number of mules, number of wagons, and the days on which the same were furnished, is hereunto attached, marked Exhibit "A" and made a part of this answer.

V.

The cross-defendant further alleges that the said mules, and wagons so furnished by this cross-defendant, as hereinabove alleged, were furnished the said DeWaard & Sons to be used in the said work and improvements being performed by the said DeWaard & Sons as set out in paragraphs two and three of the cross-complaint herein; and that the said mules and wagons were actually used upon said work and improvements and that the said DeWaard & Sons agreed and promised to pay to this cross-defendant the sum of $577.71 for the use thereof.

VI.

That no part of the said amount has been paid except the sum of $383.71, and that there remains due and owing to this cross-defendant from the plaintiffs herein the sum of $194.00, with interest thereon at the rate of 6% per annum from the 11th day of December, 1924. [152]

WHEREFORE, this *d*ross-defendant prays for judgment against the plaintiffs, DeWaard & Sons, and against the defendant, Phoenix-Tempe Stone Company, a corporation, and against the cross-defendant, Standard Accident Insurance Company of Detroit, a corporation, for the sum of $194.00, with interest thereon at the rate of 6% per annum

from December 11th, 1924, and for its costs and disbursements herein.

NORRIS & NORRIS,
Attorneys for the Cross-defendant, McGrath Mule Co.

State of Arizona,
County of Yavapai,—ss.

F. E. Flynn, being first duly sworn, deposes and says: That he is one of the attorneys for the McGrath Mule Co., one of the cross-defendants herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true except as to those matters stated on information and belief, and as to such matters he believes it to be true.

[Seal] F. E. FLYNN.

Subscribed and sworn to before me this 1st day of August, 1925.

JOHN L. SULLIVAN,
Notary Public.

My commission expires Jan. 11, 1928. [153]

EXHIBIT "A."

July 28, 1925.

DeWaard & Sons to McGrath Mule Company, Dr.

Rentals:

1924						
6 mules,	Jul. 2–31,	30 days	@	12.50..	14.51	
1 wag.,	Jul. 2–31,	30 days	@	15.00..	72.58	87.09
6 mules,	Aug. 1–8,	8 days	@	12.50..	19.35	
8 mules,	Aug. 9–31,	1 mo.	@	12.50..	74.19	
1 wagon,	Aug. 1–30,	1 mo.	@	15.00..	15.00	108.54
8 mules,	Sep. 1–30,	1 mo.	@	12.50..	100.00	
1 wagon,	Sep. 1–30,	1 mo.	@	15.00..	15.00	115.00
8 mules,	Oct. 1–31,	1 mo.	@	12.50..	100.00	
1 wagon,	Oct, 1–31,	1 mo.	@	15.00..	15.00	115.00
8 mules,	Nov. 1–30,	1 mo.	@	12.50..	100.00	
1 wagon,	Nov. 1–31,	1 mo.	@	15.00..	15.00	115.00
8 mules,	Dec. 1–10,	10 days	@	12.50..	32.25	
1 wagon,	Dec. 1–10,	10 days	@	15.00..	5.00	37.08
						577.71

1924—CREDITS:

Oct. 20, paid by check	171.21	
Nov. 26, paid by check	155.00	
Nov. 26, paid by check	51.25	
By shoeing bill paid	6.25	383.71
Balance due		$194.00

[Endorsement]: Filed Aug. 1, 1925. [154]

[Title of Court and Cause.]

ANSWER OF CROSS-DEFENDANT L. J. HASELFELD.

Comes now L. J. Haselfeld, one of the cross-defendants named above and, without waiving his demurrer and motion to dismiss, but in event the same be overruled, answers as follows:

I.

That as to allegations in the cross-complaint concerning other cross-defendants and their claims, if any, this cross-defendant is without knowledge, information or belief sufficient to answer the same, and on said account and for that ground alone, denies all allegations in so far as they may affect this cross-defendant or his rights, and except as herein specifically admitted.

II.

Admits the allegation that this cross-defendant is a resident and citizen of Arizona, and the allegation in Paragraph II that bonds were executed and delivered by the cross-complainant [155] and The Maryland Casualty Company, one of which bonds bound said parties, among other provisions, to the provisions as set out in Paragraph II, to pay claims of persons against any subcontractors on account of material or property furnished under the contract between the State Engineer of Arizona and the cross-complainant.

III.

Admits that DeWaard and Sons, as subcontrac-

tors, entered into a contract with the cross-complainant to do construction work which the cross-complainant had contracted to do with the said State Engineer, as referred to in Paragraph II of the cross-complaint; and admits that said DeWaard and Sons executed and delivered a bond with The Standard Accident Insurance Company of Detroit as surety and conditioned among other things that the said parties would promptly pay for all materials, property, labor, work and services furnished, done or performed upon or in connection with said improvement and work, or in the performance thereof; and admits that said DeWaard and Sons thereafter entered upon performance of their said contract. And this cross-defendant avers that he and his assignors did, during the time of the construction and work under said contract, furnish material and property which went into the said construction and work and was authorized therefor upon the request and at the instance of the said subcontractors; and avers that no payment of moneys due therefor have been received by this cross-defendant from any source.

IV.

That because of the failure of the said subcontractors DeWaard and Sons to pay the money due this cross-defendant, he did, without waiving his right of action against other parties liable for said payments, bring an action in the Superior Court of Yavapai County, Arizona, against the said subcontractors and The Standard Accident

Insurance Company, surety on their bond, and [156] did after trial at which both defendants were represented, obtain a judgment and decree establishing the indebtedness due this cross-defendant, and the amount thereof. That said judgment was regularly made and entered and a copy thereof so establishing the debt and the amount due this cross-defendant and decreeing a recovery therefor, is attached hereto as Exhibit "A," and is made a part hereof, the same as if set out in full at this point. And this cross-defendant hereby pleads this judgment and decree as *res adjudicata* against the said subcontractors who have not appealed therefrom within the time provided by law as against the said The Standard Accident Insurance Company, unless and until said judgment be modified as to it by the Supreme Court of Arizona, to which appeal has been made by said insurance company. And this cross-defendant further pleads the said judgment and decree as establishing and determining the indebtedness due to him and the amount thereof upon his claim for materials and property and services furnished for the said work and improvement, so establishing said debt and sum as against the said DeWaard and Sons and all other creditors and parties hereto.

V.

That no part of the sum and judgment aforesaid has been paid. And that under the bond of the cross-complainant and The Maryland Casualty Company given to the State Engineer of Arizona,

as referred to in the cross-complaint, this cross-defendant is entitled to look to the said cross-complainant and The Maryland Casualty Company for payment of the said sum due, and avers that the said money is due for property and materials furnished for and under said contract, the payment of which said bond was given to secure, and does secure. [157]

WHEREFORE, this cross-defendant prays that the judgment and decree establishing the debt due this cross-defendant, and the sum thereof, as aforesaid set out, be taken and held to establish the debt and amount due from said DeWaard and Company and from the cross-complainant and The Maryland Casualty Company, as surety, due to this cross-defendant from DeWaard and Sons, and that The Maryland Casualty Company be ordered to be and be brought in as a party to this action upon such terms as the Court may direct, and as a proper and necessary party for the purpose of determining its rights and its liabilities to this cross-defendant, and to avoid multiplicity of suits, and permitting a final decision and decree upon all parties affected thereby. And this cross-defendant prays for judgment against the said DeWaard and Sons, in confirmation of its judgment already obtained as aforesaid, and also for judgment against the cross-complainant and The Maryland Casualty Company upon their bond, for the sum with interest and costs due to him as adjudged in the aforesaid judgment and decree of

the Superior Court of Yavapai County, Arizona, and for his costs herein.

FAVOUR & BAKER,

Attorneys for Cross-defendant, L. J. Haselfeld.

[158]

EXHIBIT "A."

In the Superior Court of Yavapai County, State of Arizona.

No. 9813.

L. J. HASELFELD,

Plaintiff,

vs.

DEWAARD & SONS, a Copartnership, and STANDARD ACCIDENT INSURANCE COMPANY, OF DETROIT, a Corporation,

Defendants.

JUDGMENT AND DECREE.

This cause came on regularly to be heard on the 5th day of May, 1925, the plaintiff being represented by his attorneys Favour & Baker, and the defendants appearing by their attorneys Norris & Norris. Documentary evidence and oral testimony was introduced and received in behalf of the respective parties, and the evidence being closed and the matter submitted to the Court for consideration and decision, after due deliberation and being fully advised in the premises, the Court now makes the following

FINDINGS OF FACT.

1. That prior to May 27, 1924, the Phoenix-Tempe Stone Company had entered into a contract with the State Engineer of the State of Arizona for the construction of a portion of the Prescott-Phoenix Highway, known as Federal Aid Project Number 72–A.

2. That on or about said May 27, 1924, said Phoenix-Tempe Stone Company, by written agreement, sub-contracted to defendant De Waard & Sons a certain portion of the work to be done under said contract with the State Engineer of the State of Arizona, which said sub-contract provided in part that deWaard & Sons should furnish a bond guaranteeing the payment of all bills incurred by de Waard & Sons for materials and labor, property or services furnished to them for the said work, or on account or in connection therewith. [159]

3. That on or about May 27, 1924, said de-Waard & Sons, as principal, and the Standard Accident Insurance Company, defendant herein, as surety, executed a bond in the sum of $42,176.75 guaranteeing the performance of said sub-contract and the payment by said sub-contractors for all material, property, labor, work and services furnished, done, or performed upon or in connection with said improvements and work, or in the performance thereof, at the time said payments became due.

4. That prior to the filing of this action, plaintiff Haselfeld furnished to defendant de Waard

and Sons goods, wares and merchandise of the value of $1247.45, which were used upon and in connection with said improvements and work and in the performance thereof.

5. That de Waard & Sons maintained in connection with said improvements and work on their sub-contract, a camp where the men working on said sub-contract were boarded and which was the only camp where said men were boarded, and that it was necessary for de Waard & Sons to maintain said camp in order to have and keep the necessary labor for said work. That de Waard & Sons deducted from the wages of the laborers working on said road the sum of $1.00 per day for their board furnished at said camp.

6. That prior to the filing of this action one Ed B. Genung furnished to de Waard & Sons certain beef, of the value of $253.05, which said beef was used at said camp in the feeding of the men employed on the sub-contract, and constituted property furnished to De Waard & Sons for or in connection with said improvements and work.

7. That prior to the filing of this action the firm of Lawler & Rigdon furnished to de Waard & Sons certain beef, of the value of $204.60 which was used at said camp in the feeding of the men employed on the sub-contract, and constituted property furnished to de Waard & Sons for or in connection with said improvements and work. [160]

8. That prior to the filing of this complaint one Hix Thornburg furnished to de Waard & Sons

certain quantities of gasoline, oil, tires and other supplies which were used in the running and operation of automobiles and trucks used by de-Waard & Sons upon or in connection with said improvements and work, particularly in the hauling of materials for said work from the railroad station at Kirkland, Arizona, to the portion of the highway under construction by de Waard & Sons, said goods being of the value of $348.78.

9. That prior to the filing of this action one J. L. Summers hired to de Waard & Sons certain mules which were used by them upon and in connection with said improvements and work, and that the agreed price for the use of said mules was $255.00.

10. That prior to the filing of this action said Genung, Lawler & Rigdon, Thornburg, and Summers, transferred and assigned to plaintiff herein their respective claims against de Waard & Sons on account of the materials and labor furnished said de Waard & Sons as aforesaid, and that at the time of the filing of this action plaintiff Haselfeld was the owner of all of said claims, the total amount thereof, including plaintiff's own claim, being $2,308.88, and said de Waard & Sons were then and are now indebted to plaintiff in the said sum of $2,308.88, with interest as hereinafter stated.

11. That all facts necessary to support this judgment and decree have been proved and established by competent evidence.

From the foregoing facts the Court makes the following

CONCLUSIONS OF LAW.

That plaintiff is entitled to judgment against the defendants, de Waard & Sons and the Standard Accident Insurance Company, and each of them, in the said sum of $2308.88, with interest thereon at the rate of six per cent per annum from the date of the filing of the complaint herein, to wit: December 19, 1924. [161]

WHEREFORE, by reason of the law and the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff, L. J. Haselfeld, *to* have and recover from defendants de Waard & Sons, a copartnership, and Standard Accident Insurance Company of Detroit, a corporation, or either of them, the sum of $2308.88, with interest thereon at the rate of six per cent per annum from the 19th day of December, 1924, until paid, together with the costs of this action in the sum of $41.40.

Dated this 27th day of June, 1925.

(Signed) JOHN J. SWEENEY,
Judge of the Superior Court.

(Filed June 27, 1925.)

[Endorsed]: Filed Mar. 30, 1926. [162]

[Title of Court and Cause.]

MOTION OF CROSS-DEFENDANT L. J. HASELFELD FOR ADDITION OF NECESSARY PARTY.

Comes now the cross-defendant, L. J. Haselfeld, for himself alone and for no others and, without waiving his demurrer and motion to dismiss hereinbefore interposed, respectfully moves the Court for an order making The Maryland Casualty Company a party, and as grounds, assigns the following:

It appears from the face of the cross-complaint that The Maryland Casualty Company, is surety upon the bond of the cross-complainant, executed and delivered to the State Engineer for the purpose of securing the payment of moneys due or to become due on account of materials and property furnished in the work, and contract which is the subject of the cross-complaint; and that said bond, by its terms, specifically inures to the benefit of any persons who may have claims against the contractors or subcontractors, under said contract. [163]

That this defendant has such a claim, which has been established by judgment in the Superior Court of Yavapai County, Arizona, against the subcontractors De Waard and Sons, and against the cross-defendant The Standard Accident Insurance Company of Detroit, which claim is covered by the said bond on which The Maryland Casualty

Company is surety and bounden, and the said surety is a proper and necessary party to this action for the purpose of determining and decreeing its liability to this cross-defendant upon the said bond and on account of the money due for material and property furnished the subcontractors aforesaid, and is a necessary party in order that the controversy may be completely and finally determined as between this cross-defendant and all parties liable to him for materials and property so furnished, and in order to avoid multiplicity of suits.

WHEREFORE, the undersigned cross-defendant prays that this Court order that the said The Maryland Casualty Company be made and brought in as a party to the cross-complaint, by the cross-complainant, to the extent that the controversy affects the rights of this cross-defendant.

FAVOUR & BAKER,

Attorneys for Cross-Defendant, L. J. Haselfeld.

[Endorsed]: Filed Mar. 30, 1926. [164]

ANSWER OF EZRA W. THAYER.

Comes now Ezra W. Thayer, one of the cross-defendants, in the above-entitled suit and files herewith a certain copy of an itemized statement of material furnished De Waard & Sons, shipped to them by freight to Kirkland, Arizona, to be used by them in the prosecution of their contract on Federal Aid Project #72A.

EZRA W. THAYER,

Cross-Defendant. [165]

Phoenix, Arizona, July 24, 1925.

DeWard & Son, Kirkland, Arizona, Dr. to EZRA W. THAYER.

1924.				
Oct. 13,	25	jts. 5″ Stove Pipe.....	5.00	
	6	10″ Mill Files.....	2.10	
	5	lbs. 3d Common Nails..	.40	
	1	Soup Skimmer	.20	
	2	Baking Pans	1.50	
	12	Single Loaf Pans.....	2.00	
	1	Flour Sifter	.25	
	3	Milk Pitchers, 3 qts.....	3.75	
	3	Syrup Pitchers	1.95	
	6	Heavy Concrete Buckets	10.20	
	6	Sledge Hammer Handles	2.10	29.45
Oct. 15,	1	3x2½ Bushing	.40	
	3	Rayo Lamp Chimneys..	.75	30.60
Oct. 27,	1	Keg 6d com. Nails.....	6.10	
	1	Keg 8d com. Nails.....	5.80	
	1	Keg 10d com. Nails.....	5.70	
	2	Keg 20d com. Nails@5.50	11.00	
	2	Keg 40d com. Nails@5.50	11.00	70.20
			$70.20	$70.20
Nov. 3,	1	Complete Lining for Vigilant Range 618 F Complete Bottom Grate...		15.00
		Total.....		$85.20

I hereby certify that the above account is for material, furnished DeWard & Son and shipped to Kirkland, Arizona, to be used by them in the prosecution of their work on Federal Aid Project #72A, and the above is a true and correct statement of all goods furnished them by us and that no part of the same has been paid.

(Notary Seal) EZRA W. THAYER.
By EZRA W. THAYER.

BJJ:H.

Subscribed and sworn to before me this 27th day of July, 1925.

(Seal) THOS. H. MITCHELL,
Notary Public,
Phoenix, Ariz.

My commission expires July 31, 1926. [166]

[Endorsed]: Filed Jul. 28, 1925. [167]

[Title of Court and Cause.]

ANSWER OF SPENCER BURKE.

Comes now the cross-defendant Spencer Burke, and in answer to the cross-complaint herein alleges, denies and admits as follows: [168]

I.

Said cross-defendant admits the allegations contained in paragraphs I, II and III of said cross-complaint.

II.

That as to the allegations contained in Paragraph

IV of said cross-complaint, this cross-defendant has no knowledge or information upon which to form a belief, and therefore denies the same.

III.

That as to the allegations contained in Paragraph V of said cross-complaint, this cross-defendant admits that the said Spencer Burke did perform certain services, personal and otherwise, in and about the construction of the work and improvement described in said cross-complaint, all of which was done at the special instance and request and for the benefit of said DeWaard and Sons.

IV.

As a further answer to said cross-complaint, said cross-defendant alleges that between the 1st day of Nov., 1924, and the 21 day of Jany., 1925, said cross-defendant delivered to said plaintiff, DeWaard and Sons, certain goods and materials, at the special instance and request of said DeWaard and Sons, and did and performed certain work and labor all in connection with the work and improvement mentioned and described in said cross-complaint, all of the agreed value of Eight Hundred Sixty and Sixty-three one-hundredths ($860.63) Dollars, less certain credits to the amount of Four Hundred Twenty-seven and Eighty-three Hundredths ($427.-83) Dollars. That an itemized statement of all of said work, material, charges and credits are set forth in the annexed statement, marked Exhibit "A" and made a part of this answer. [169]

V.

Cross-defendant further alleges that all of the goods and materials furnished as hereinbefore alleged, and all of the work and labor performed as in said statement contained, were furnished to said DeWaard and Sons to be used in said work and improvement being performed by said DeWaard and Sons as set out in Paragraphs II and III of said cross-complaint, and that said goods were used and said labor and material actually applied to said work and improvement.

VI.

That no part of said goods and materials sold and delivered to said DeWaard and Sons, and none of the work so furnished to said DeWaard and Sons has been paid for in whole or in part except only as stated hereinbefore, and itemized in said statement, and that there is now due and owing to the cross-defendant, Spencer Burke, from said DeWaard and Sons, the sum of Four Hundred Thirty-two and Eighty Hundredths ($432.80) Dollars, with interest thereon from the 21st day of Jany., 1925, at the rate of six per cent per annum.

WHEREFORE, this cross-defendant prays for judgment against DeWaard and Sons, and against the cross-plaintiff, Phoenix-Tempe Stone Company, and against the cross-defendant Standard Accident Insurance Company, for the sum of Four Hundred Thirty-two and Eighty Hundredths ($432.80) Dollars, together with interest at the rate of six per cent

per annum from the 21st day of Jany., 1925, and for the costs of this answer.

M. L. OLLERTON,
JAMES P. LAVIN,
Attorneys for Cross-defendant, Spencer Burke.
[170]

State of Arizona,
County of Maricopa,—ss.

Spencer Burke, being first duly sworn, deposes and says:

That he is the cross-defendant hereinbefore named; that he has read the foregoing answer and knows the contents thereof; that the same is true as stated therein, except as to matters therein stated upon information and belief, and as to all such matters, he believes it to be true.

SPENCER BURKE.

Subscribed and sworn to before me this 17 day of August, 1925.

[Seal] M. L. OLLERTON,
Notary Public.

My commission expires Sept. 1, 1928. [171]

EXHIBIT "A."

DeWARD & SON, Dr.
To Spencer Burke, Kirkland, Arizona.

424.68	Cu. Yds. Sand and Gravel @ 1.75	743.18
1	4 up Team Hauling Water 1 day @ 12.50	12.50
1	4 up Team Hauling Water ¾ day @ 12.50	9.40

321	Sacks Cement hauled @ 20¢	64.20
36	Sacks Cement hauled @ 15¢	5.40
	Hauling Water Wagon	6.25
	Towing Ford Truck	4.70
	Hauling Equipment	15.00
		860.63

Credits.

	Board	87.50	
	Laborer (1 day)	3.50	
	Commissary	4.80	
	Rent for Mules	50.00	
11	Bales Hay @ 75¢	8.25	
5½	Sacks Oats @ 2.55	14.02	
	Rent on Truck	3.00	
	Lumber for Wagon	2.00	
	Cash Received	254.76	427.83
	Balance Due		432.80

SPENCER BURKE. [172]

[Endorsed]: Recd. copy of above answer.

KIBBEY, BENNETT, GUST, SMITH & LYMAN,

Atty. for Phoenix-Tempe Stone Company, a Corporation.

[Endorsed]: Filed Aug. 18, 1925. [173]

[Title of Court and Cause.]

ANSWER OF WILLIS, ROGERS, WINSOR & COLEMAN.

Come now the cross-defendants, Willis, Rogers, Winsor and Coleman, and in answer to the cross-complaint, allege, deny, and admit as follows: [174]

I.

Cross-defendants admit allegations contained in paragraphs one, two, and three in the cross-complaint.

II.

That, as to the allegations contained in paragraph four of the cross-complaint, these defendants had no knowledge or information upon which to form a belief, therefore denies the same.

III.

As to the further allegations contained in the cross-complaint, these cross-defendants have no knowledge or information upon which to form a belief, and therefore denies the same.

That as further answer to the cross-complaint the said cross-defendants allege:

I.

That between the first day of October, 1924, and the last day of October, 1924, these cross-defendants at the special request of the plaintiffs, DeWaard & Sons and with their consent and by their authori-

zation performed labor and services for the said plaintiffs as follows, to wit:

Oct.	1	2 men, 1 team, 2½ days hauling pipe.	$30.00
Station	884	Excavating for pipe, 3 men 2 days each	21.00
894	50	Excavating for pipe, 2 men 1 day each	7.00
899	40	Drilling and blasting for pipe.....	13.00
912	35	Excavating for pipe, 1 man ½ day..	1.75
935	60	Excavating for pipe, 2 men 6 hours.	5.25
939		Excavating for pipe, 2 men ½ day...	3.50
945	65	Excavating for pipe, 2 men ½ day...	3.50
965	25	Excavating for pipe, 3 men 1 day...	10.50
980	40	Excavating for pipe, 5 men ½ day...	8.75
			$104.25

II.

That the reasonable value of said labor and services was [175] One Hundred Four Dollars and Twenty-five Cents ($104.25), that all is said work and labor and services performed at the special request and for the benefit of DeWaard & Sons.

III.

That no part of the amount due for the said labor and services has been paid and there is now due and owing these cross-defendants from the said plaintiffs the sum of ($104.25) One Hundred Four Dollars and Twenty-five Cents, with interest thereon from the first day of November, 1924, at 6% per annum.

WHEREFORE these defendants pray:

That judgment against the plaintiffs DeWaard &

Sons and against the defendant Phoenix-Tempe Stone Company, a corporation, and against the cross-defendants, Standard Accident Insurance Company of Detroit, a corporation, for the sum of One Hundred Four Dollars and Twenty-five Cents ($104.25), with interest thereon at the rate of 6% per annum from November 1, 1924, and for their costs and disbursements herein.

GREER & GREER.
By THOS. R. GREER,
Attorneys for Cross-defendants, Willis, Rogers, Winsor & Coleman.

State of Arizona,
County of Maricopa,—ss.

Thomas R. Greer being first duly sworn, says: I am the attorney for the cross-defendants in this action; I have read the foregoing answer and cross-complaint and know the contents thereof and the same is true of my own knowledge, except as to those matters therein averred thereby upon information or belief as to these matters I believe them to be true.

THOS. R. GREER.

Subscribed and sworn before me this third day of April, 1926.

[Seal] GILBERT E. GREER,
Notary Public.

My commission expires 1926/4/3. [176]

[Endorsed]: Filed Apr. 16, 1926. [177]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT, BASFORD AND BURMISTER CO., A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and for answer to the purported cross-complaint filed herein by the cross-defendants, Basford and Burmister, a corporation, specifically reserving their demurrer to such answer and purported cross-complaint heretofore filed herein, and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-complaint, deny, admit, and allege as follows:

1.

Answering the allegations contained in Paragraph two of said purported cross-complaint, plaintiffs deny that all of the goods, wares and merchandise alleged by cross-defendants to have been furnished the plaintiffs to be used in connection with said work or improvement as described in said purported cross-complaint and denies that said goods or material or any portion thereof were actually used by plaintiffs at all and further allege that the said goods described in said purported cross-complaint were purchased from cross-defendants for use in said work and stored upon said job for use and that the defendant Phoenix-Tempe Stone Company failed to pay plaintiffs for the work being done under said

contract and by reason thereof plaintiffs were unable to proceed with the [178] performance thereof and the said Phoenix-Tempe Stone Company entered upon the said work and appropriated and used the said goods, wares and merchandise with the knowledge and consent of the said cross-defendants herein and that at said time the said cross-defendants released the plaintiffs from any obligation to pay for said goods and consented to the appropriation of said goods by the Phoenix-Tempe Stone Company for the full amount of said merchandise which was accepted by the cross-defendants in full discharge of any obligation of plaintiffs to pay for the same.

WHEREFORE, plaintiffs and the said Standard Accident Insurance Company, a corporation, cross-defendant, pray that cross-defendants have and recover nothing from plaintiffs or said Standard Accident Insurance Company, a corporation, cross-defendant, by reason of this action.

CROUCH & SANDERS,

Attorneys for Plaintiff and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [179]

State of California,
County of San Diego,—ss.

L. DeWaard, being by me first duly sworn, deposes and says:

I am the one of the plaintiffs in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant Bashford and

Burmister, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true. And I also verify this in behalf of the Standard Accident Insurance Company, a corporation, cross-defendants.

L. DeWAARD.

Subscribed and sworn to before me, this 25th day of August, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California.

[Endorsed]: Filed Aug. 27, 1925. [180]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE CROSS-DEFENDANT GUARDIAN TRUST COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and demur to the answer and cross-complaint of the Guardian Trust Company, a corporation, and for grounds of demurrer allege:

I.

That the answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plaintiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant herein, or against the Standard Accident Insurance Company, of Detroit, a corporation, cross-defendant.

III.

That the allegations of the answer and cross-complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [181]

[Endorsement]: Filed Aug. 27, 1925. [182]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT, GUARDIAN TRUST COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendan*d*, and for answer to the purported cross-complaint filed herein by the cross-defendants, the Guardian Trust Company, a corporation, specifically reserving their demur*r* to such answer and purported cross-complaint hereto-

fore filed herein, and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-complaint deny, admit, and allege as follows:

I.

Answering the allegations contained in paragraph three of said purported cross-complaint, plaintiffs and the said Standard Accident Insurance Company, a corporation, cross-defendant, deny that upon the purchase of the policy of insurance described in said purported cross-complaint said cross-defendants agreed to furnish insurance to plaintiffs up to May 29th, 1925, or any definite time and allege that said insurance was to be terminated at any time notice thereof was given by plaintiffs or for failure to pay premium.

II.

Answering the allegations contained in paragraph four of said purported cross-complaint, plaintiffs and the said Standard Accident Insurance Company of Detroit, a corporation, deny that in [183] consideration thereof or in consideration of any policies made by the said cross-defendants the plaintiffs promised or agreed to pay the Guardian Trust Company, a corporation, cross-defendants, the sum of $258.85 or any sum whatever and deny that any sum due or owing from plaintiffs to said cross-defendants is unpaid.

III.

Plaintiffs and the said Standard Accident Insurance Company, a corporation, cross-defendant,

allege that on or about the first of January, 1925, that the Phoenix-Tempe Stone Company, defendants herein, failed to pay plaintiffs for work done or performed in connection with work described in plaintiffs' complaint and otherwise violated their obligations in relation thereto as described in said complaint herein and that by reason thereof plaintiffs were forced to abandon and discontinue prosecution of said work and improvement and that at said time plaintiffs were so forced to abandon and discontinue said work that they paid the said Guardian Trust Company all sums then due by reason of the insurance described in their said cross-complaint and that all services furnished thereafter under such policy of insurance were furnished the defendant Phoenix-Tempe Stone Company, a corporation, and that plaintiffs nor the Standard Accident Insurance Company, a corporation, cross-defendants, do not owe the said cross-defendants, Guardian Trust Company, a corporation, for any policy thereof.

WHEREFORE plaintiffs pray that the said company have and recover nothing from plaintiffs and the said Standard Accident Insurance Company, a corporation, cross-defendants, by reason of this action.

CROUCH and SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-Defendant. [184]

State of California,
County of San Diego,—ss.

L. DeWaard, being by me first duly sworn, deposes and says:

I am the one of the plaintiffs in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant, Guardian Trust Company, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true.

And I also verify this in behalf of the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant.

L. DEWAARD.

Subscribed and sworn to before me, this 25th day of August, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California.

Filed Aug. 27, 1925. [185]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE UNION OIL COMPANY OF ARIZONA, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants, and demurr to the answer and cross-complaint of the Union Oil Company of Arizona, a corporation and for grounds of demurrer allege:

I.

That the said answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plaintiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant herein, or against the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

III.

That the allegations of the answer and cross-

complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [186]

Filed Aug. 27, 1925. [187]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT, UNION OIL COMPANY OF ARIZONA, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and for answer to the purported cross-complaint filed herein by the cross-defendants, Union Oil Company of Arizona, a corporation, specifically reserving their demurr to such answer and purported cross-complaint heretofore filed herein, and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-complaint deny, admit, and allege as follows:

I.

Answering the allegations contained in paragraph six of said purported cross-complaint, the plaintiffs and said cross-defendant deny that all of said goods, wares or merchandise so alleged to have been sold by said Union Oil Company of

Arizona, to plaintiffs, was furnished for or used in or for, on or about, or in connection with the said work, or improvement described in said purported cross-complaint by plaintiffs or any portion thereof. And allege that the defendant, Phoenix-Tempe Stone Company, violated the terms of the said contract as described in plaintiffs' complaint herein, and that by reason of said violation plaintiffs were forced to discontinue work upon said contract as alleged in said complaint and that thereupon the said defendant, Phoenix-Tempe [188] Stone Company, entered upon the said work and appropriated the material furnished for use in connection with said work by the cross-defendant, Union Oil Company of Arizona, with a knowledge and consent of the said Union Oil Company and the said Union Oil Company of Arizona, permitted and consented to the said defendant, Phoenix-Tempe Stone Company, taking and using of said material upon the said work and at said time the plaintiffs delivered and gave to the said Union Oil Company an order upon the Phoenix-Tempe Stone Company for the full amount of said goods, wares and merchandise furnished by them in connection with said work and the said order was accepted by the said cross-defendant, Union Oil Company as full discharge of all obligations on the part of plaintiffs to pay anything on account thereof.

WHEREFORE plaintiffs and the said cross-defendant Standard Insurance Company of Detroit, a corporation, pray that the cross-defendants and

cross-complainants, Union Oil Company have and recover nothing from the plaintiffs or the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, by reason of their purported cross-complaint.

CROUCH & SANDERS,

Attorneys for Plaintiffs, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [189]

State of California,
County of San Diego,—ss.

L. DeWaard being by me first duly sworn, deposes and says:

I am the one of the plaintiffs in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant Union Oil Company of Arizona, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true.

And I also verify this in behalf of the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant.

L. DEWARRD.

Subscribed and sworn to before me this 25th day of August, 1925.

[Seal] OTTILIE M. WENDEL,

Notary Public in and for the County of San Diego, State of California.

[Endorsed]: Filed Aug. 27, 1925. [190]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE CROSS-DEFENDANT, MOTOR SUPPLY COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and demur to the answer and cross-complaint of the Motor Supply Company, a corporation, and for grounds of demurrer allege:

I.

That the answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plaintiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant herein, or against the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

III.

That the allegations of the answer and cross-

complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [191]

[Endorsement]: Filed Aug. 27, 1925. [192]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE WESTERN PIPE AND STEEL COMPANY OF CALIFORNIA.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants, and demurr to the answer and cross-complaint of the Western Pipe and Steel Company of California, a corporation, and for grounds of demurrer allege:

I.

That the said answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plain-

tiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant herein, or against the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

III.

That the allegations of the said answer and cross-complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [193]

[Endorsement]: Filed Aug. 27, 1925. [194]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT, WESTERN PIPE AND STEEL COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and for answer to the purported cross-complaint filed herein by the cross-defendant, Western Pipe and Steel Company, a corporation, specifically reserving their demurr to such answer and purported cross-complaint heretofore filed herein, and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-com-

plaint heretofore filed herein, and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-complaint denies, admits and alleges as follows:

I.

In answer to the said purported complaint filed herein by said cross-defendant, Western Pipe and Steel Company, of California, a corporation, plaintiffs and said cross-defendants allege that the said materials herein were purchased by plaintiffs from the said cross-defendants, Western Pipe and Steel Company for use in connection with the improvement described in plaintiffs' complaint. That subsequent to plaintiffs entereing upon the performance of said contract, the Phoenix-Tempe Stone Company, a corporation, refused to pay plaintiffs for the work done thereunder as alleged in [195] plaintiffs' complaint and that by reason thereof plaintiffs were forced to abandon and discontinue further work upon said contract for the reason described in plaintiffs' complaint. That thereupon the said Phoenix-Tempe Stone Company, entered upon the further performance of said work and appropriated the material furnished by said Western Pipe and Steel Company, and used said material in connection with said work, with the knowledge and consent of the said Western Pipe and Steel Company who permitted the Phoenix-Tempe Stone Company to take the said material and use the same in connection with said work. That in connection therewith and at the same time the

plaintiffs gave to the said Western Pipe and Steel Company an order upon the Phoenix-Tempe Stone Company for the full amount due for the goods, wares and merchandise claimed to have been delivered for use in connection with the said work by this cross-complaint, which said order was accepted by the said cross-defendant Western Pipe and Steel Company in full and complete discharge of any and all obligation on the part of plaintiffs to pay for any portion thereof.

WHEREFORE plaintiffs and said cross-defendants Standard Accident Insurance Company pray that cross-defendant Western Pipe and Steel Company have and recover nothing by reason of the said cross-complaint.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit a Corporation, Cross-defendant. [196]

State of California,
County of San Diego,—ss.

L. DeWaard being by me first duly sworn, deposes and says:

I am the one of the plaintiffs in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant, Western Pipe and Steel Company, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true.

And I also verify this in behalf of the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant.

L. DEWAARD.

Subscribed and sworn to before me, this 25th day of August, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California.

Filed Aug. 27, 1925. [197]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE CROSS-DEFENDANT, HEAD LUMBER COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendand and demurr to the answer and cross-complaint of the Head Lumber Company, a corporation, and for grounds of demurrer allege:

I.

That the answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not

state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plaintiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-complainant herein, or against the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

III.

That the allegations of the answer and cross-complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and The Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [198]

[Endorsed]: Filed Aug. 27, 1925. [199]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT, HEAD LUMBER COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and for answer to the purported cross-complaint filed herein by the cross-defendant, the Head Lumber Company, a corporation, specifically reserving their demurr to such answer and purported cross-complaint heretofore filed herein, and relying upon this answer only in the event their said demurrer be denied or over-

ruled, for answer to said purported cross-complaint deny, admit, and allege as follows:

I.

Answering the allegations contained in paragraph five of the said purported cross-complaint, plaintiffs and the said Standard Accident Insurance Company, a corporation, deny that the said goods, wares and merchandise alleged to have been sold and furnished plaintiffs by said cross-defendants, were used or any portion thereof, was used by plaintiffs in connection with the said work or improvement being performed by plaintiffs as described in said purported cross-complaint and allege that the said goods were purchased by plaintiffs from said cross-defendants to be used in connection with said work and improvement and that in the prosecution of said work and improvement the defendants, Phoenix-Tempe Stone Company, herein failed to pay plaintiffs for performance of their work in connection with said contract whereby plaintiffs [200] were prevented from continuing said work and that thereupon the said defendants Phoenix-Tempe Stone Company appropriated and took over the said goods, wares and merchandise claimed to have been furnished by cross-defendants, used the said materials in connection with said work and improvement.

That at said time the plaintiffs gave the said cross-defendants an order on the Phoenix-Tempe Stone Company, for the full amount of said material and goods as set forth in said purported cross-complaint which said cross-defendants ac-

cepted as a full and complete discharge of any obligation of plaintiffs to pay for said goods, wares and merchandise or any portion thereof.

WHEREFORE plaintiffs deny that they owe the said cross-defendants any sum whatever and pray that the said purported cross-defendants have and recover nothing from the plaintiffs or said Standard Accident Insurance Company, a corporation, cross-defendant, by reason of this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [201]

State of California,
County of San Diego,—ss.

L. DeWaard, being by me first duly sworn, deposes and says:

I am the one of the *plaintiff* in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant, Head Lumber Company, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to those matters I believe them to be true. And I also verify this in behalf of the Standard Accident Insurance Company, of Detroit, a corporation, cross-defendant.

L. DeWAARD.

Subscribed and sworn to before me, this 25th day of August, 1925.

[Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California.

Filed Aug. 27, 1925. [202]

[Title of Court and Cause.]

DEMURRER TO THE ANSWER AND CROSS-COMPLAINT OF THE CROSS-DEFENDANT, THE McGRATH MULE COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, and demurr to the answer and cross-complaint of the McGrath Mule Company of Arizona, a corporation and for grounds of demurrer allege:

I.

That the answer does not state sufficient facts to constitute an answer or defense to plaintiff's complaint herein or a defense to the cross-complaint of the Phoenix-Tempe Stone Company, herein.

II.

That the allegations of the cross-complaint do not state facts sufficient to constitute a defense or a cause of action or a cross-complaint against plaintiffs herein, or against the Phoenix-Tempe Stone Company, a corporation, defendant and cross-com-

plainant herein, or against the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

III.

That the allegations of the answer and cross-complaint are of facts not proper to be plead in this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company of Detroit, a Corporation, Cross-defendant. [203]

[Endorsement]: Filed Aug. 27, 1925. [204]

[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF CROSS-DEFENDANT THE McGRATH MULE COMPANY, A CORPORATION.

Comes now the plaintiffs above named and the Standard Accident Insurance Company of Detroit, a corporation, cross-defendant and for answer to the purported cross-complaint filed herein by the cross-defendants, The McGrath Mule Company, a corporation, specifically reserving their demurr to such answer and purported cross-complaint heretofore filed herein and relying upon this answer only in the event their said demurrer be denied or overruled, for answer to said purported cross-complaint deny, admit, and allege as follows:

I.

Answering the allegations contained in para-

graph four of said purported answer and cross-complaint, plaintiffs and said Standard Accident Insurance Company, a corporation, deny that between the first day of July, 1924, and the 11th day of December, 1924, that the said cross-defendant did furnish the plaintiffs the use of certain mules and wagons at the special instance or at the request of said plaintiffs or at the agreed value of $577.71. Plaintiffs further deny that a purported itemized statement showing the number of mules or the number of wagons or the days on which the same were furnished, is a true or correct statement of the facts attempted to be set forth therein. [205]

II.

Answering the allegations contained in paragraph five of the said purported cross-complaint, plaintiffs and the said Standard Accident Insurance Company of Detroit, a corporation, denies that cross-defendant furnished the said mules and wagons as alleged in purported cross-complaint or that said mules or wagons were furnished to the plaintiffs to be used in the work or improvement being performed by plaintiffs as set out in paragraphs two and three of the cross-complaint by defendants herein and denies that said mules or wagons were actually used upon said work or improvement by plaintiffs and deny that plaintiff agreed or promised to pay to said cross-defendant the sum of $577.71 or any other sum which has not been fully paid.

III.

Plaintiffs and the said Standard Accident Insur-

ance Company of Detroit, a corporation, allege that the items set forth in said cross-complaint for a portion of the month of October, the month of November and the month of December, and amounting to $194.00, is for mules and wagons furnished the Phoenix-Tempe Stone Company, the defendants herein, and not for mules and wagons furnished the plaintiffs and denies that plaintiff owe the said cross-defendant for any portion thereof.

WHEREFORE, plaintiffs and said Standard Accident Insurance Company of Detroit, a corporation, cross-defendant, pray that said purported cross-defendant have and recover nothing from plaintiffs or said Standard Accident Insurance Company of Detroit, a corporation, by reason of this action.

CROUCH & SANDERS,

Attorneys for Plaintiff, and Standard Accident Insurance Company, of Detroit, a Corporation, Cross-defendant. [206]

State of California,
County of San Diego,—ss.

L. DeWaard, being by me first duly sworn, deposes and says:

I am the one of the plaintiffs, in the foregoing entitled action and know the contents of the answer to cross-complaint of cross-defendant, McGrath Mule Company, a corporation, to which this affidavit is attached. The facts therein stated are true of my own knowledge, except as to those matters which are stated on my information and belief, and as to

those matters I believe them to be true. And I also verify this in behalf of the Standard Accident Insurance Company of Detroit, a corporation, cross-defendants.

L. DeWAARD.

Subscribed and sworn to before me this 25th day of August, 1925.

[Notarial Seal] OTTILIE M. WENDEL,
Notary Public in and for the County of San Diego, State of California. [207]

[Endorsement]: Filed Aug. 27, 1925. [208]

[Title of Court and Cause.]

VERDICT.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs and assess their damages at $16,500.00 Sixteen Thousand Five Hundred Dollars.

J. O. SEXTON,
Foreman.

[Endorsed]: No. L.–413 (Phoenix). United States District Court, District of Arizona. L. DeWaard, H. DeWaard, and L. DeWaard, Jr., Copartners, Doing Business Under the Firm Name and Style of DeWaard & Sons, Plaintiffs, vs. Phoenix-Tempe Stone Company, a Corporation, Defendant. Verdict.

[Endorsed]: Filed May 1, 1926. C. R. McFall, Clerk. [209]

In the District Court of the United States in and for the District of Arizona.

No. L.–413—PX.

L. DEWAARD, H. DEWAARD and L. DEWAARD, Jr., Copartners Doing Business Under the Firm Name and Style of DEWAARD & SONS,

Plaintiffs,

vs.

PHOENIX–TEMPE STONE COMPANY, a Corporation,

Defendant,

PHOENIX–TEMPE STONE COMPANY, a Corporation,

Cross-complainant,

vs.

L. DEWAARD, H. DEWAARD and L. DEWAARD, Jr., Copartners Doing Business Under the Firm Name and Style of DEWAARD & SONS,

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation, PRATT–GILBERT COMPANY, a Corporation, BASHFORD BURMISTER COMPANY, a Corporation, GUARDIAN TRUST COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, ARIZONA GROCERY COMPANY, a Corporation, MOTOR SUPPLY

COMPANY, a Corporation, WESTERN PIPE & STEEL COMPANY, a Corporation, HEAD LUMBER COMPANY, a Corporation, McGRATH MULE COMPANY, a Corporation, BENSON LUMBER COMPANY, a Corporation, L. J. HASELFELD, JULES VERMEESCH, REDMOND TOOHEY, EZRA W. THAYER and SPENCER BURK, H. F. WILLIS, CHARLES ROGERS, GEORGE WINSOR and JOHN R. COLEMAN, a Copartnership Doing Business Under the Name and Style of WILLIS, ROGERS, WINSOR & COLEMAN,

Cross-defendants.

JUDGMENT.

This case came on regularly for trial on the 16th day of April, 1926, before the above-entitled court sitting with a jury, the plaintiffs appearing in person and by counsel Crouch & Sanders and Norris & Norris and the defendant appearing and by counsel Kibbey, Bennett, Gust, Smith & Lyman, and each of the cross-defendants appearing either in person or by counsel and all parties announcing [210] ready, the jury, of twelve qualified jurors, was duly and regularly empaneled and sworn to try said action.

It was thereupon stipulated by and between all of the parties that the question raised by the petitions and claims of the cross-defendants would not be submitted to the jury, but would be left to the determination of the Court and it was further stipulated in open court by the attorneys for the plain-

tiffs, DeWaard & Sons, and by the attorneys for the defendant, Phoenix-Tempe Stone Company, that all of the said claims filed by said cross-defendants were valid and legal claims against the said plaintiffs and defendant, in the amount designated in each of said claims, for and on account of labor and materials furnished to the plaintiff in connection with the performance of the subcontract between plaintiffs and the defendant, with the exception of the claim of the cross-defendant Jules Vermeesch, who was in default, having filed no claim and not being present in court, and the claim of Redmond Toohey, which claim was thereupon withdrawn from the consideration of the Court or jury in this case by the consent of counsel.

The cause then proceeded to trial between DeWaard & Sons as plaintiffs and the Phoenix-Tempe Stone Company as defendant and the Standard Accident Insurance Company of Detroit, a corporation, as cross-defendants. Witnesses for the plaintiffs and for the defendants were sworn and examined and documentary evidence introduced; the trial of said cause continuing from day to day, excepting Sundays, and up to and including the 30th day of April, 1926;—whereupon, after argument by respective counsel and the instructions of the Court, the cause was submitted to the jury for their consideration. The jury thereupon having retired in charge of the Bailiff to deliberate upon their verdict, and subsequently on the 1st day of May, 1926, were returned into court and delivered to the said

court their verdict in words and figures as follows, to wit: [211]

"We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oath do find the issues thereof in favor of the plaintiffs and against the defendants the Phoenix-Tempe Stone Company, a corporation, and assess plaintiffs' damages in the sum of $16,500.00 (Sixteen Thousand Five Hundred Dollars)."

which verdict was signed by the foreman and was thereupon duly filed.

NOW, THEREFORE, on this day on motion of Norris & Norris, attorneys for plaintiffs, it is ordered that judgment be entered herein in accordance with the verdict in said court.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the plaintiffs L. DeWaard, H. DeWaard and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, and against the defendants Phoenix-Tempe Stone Company, a corporation, in the sum of Sixteen Thousand Five Hundred ($16,500.00) and for their costs and disbursements in the sum of Two Hundred Sixty-eight and 60/100 Dollars ($268.60), together with interest on all of said judgment at the rate of six per cent (6%) per annum from the date hereof, and

WHEREAS the matter of the claims of the cross-defendants herein has been submitted to the

Court pursuant to the stipulation made in open court and the Court having considered the matter and being full*ed* advised in the premises,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered herein in favor of the following named cross-defendants and against L. DeWaard, H. DeWaard, and L. DeWaard, Jr., copartners doing business under the firm name and style of DeWaard & Sons, plaintiffs, the Phoenix-Tempe Stone Company, a corporation, defendants, Standard Accident Insurance [212] Company of Detroit, a corporation, and the Maryland Casualty Company, a corporation, cross-defendants for the following amounts respectively:

H. F. Willis, Charles Rogers, George Winsor and John R. Coleman, a copartnership, doing business under the name and style of Willis, Rogers, Winsor & Coleman,

One hundred four and 25/100 Dollars ($104.25) with interest thereon at six per cent (6%) per annum from Nov. 1, 1924, and costs and disbursements in the sum of $2.00.

L. J. Haselfeld.

Twenty-three hundred fifty and 28/100 ($2,-450.28) with interest on $2,308.88 at 6% per annum from December 19, 1924, and on $41.40 from June 25, 1925, and costs and disbursements in the sum of $2.75.

Western Pipe & Steel Company, a corporation.

Eighteen hundred and thirty-four dollars ($1,834.00) with interest thereon at six per

cent (6%) per annum from Aug. 12, 1924, and costs and disbursements in the sum of $2.00.

Spencer Burke.

Four hundred thirty-two and 80/100 ($432.80) with interest thereon at six per cent (6%) per annum from Jan. 21, 1925, and costs and disbursements in the sum of $2.00.

McGrath Mule Co., a corporation.

One hundred and ninety-four dollars ($194.00) with interest thereon at six per cent (6%) per annum from Dec. 11, 1924, and costs and disbursements in the sum of $2.00.

Head Lumber Company, a corporation.

Three hundred fifty-six and 58/100 dollars ($356.58) with interest thereon at six per cent (6%) per annum from Dec. 1, 1924, and costs and disbursements in the sum of $2.00.

Arizona Grocery Company, a corporation.

Eight hundred forty-three and 53/100 dollars ($843.53) with interest thereon at six per cent (6%) per annum from Jan. 1, 1925, and costs and disbursements in the sum of $2.00.

Guardian Trust Company, a corporation.

Two hundred fifty-eight and 85/100 dollars ($258.85) with interest thereon at six per cent (6%) per annum from Dec. 1, 1924, and costs and disbursements in the sum of $2.00.

Bashford Burmister Company, a corporation.

Seven hundred sixty-seven and 27/100 dollars ($178.08) with interest thereon at six per cent (6%) per annum from Dec. 1, 1924, and costs and disbursements in the sum of $2.00. [213]

Motor Supply Company, a corporation.

One hundred fifty-nine and 38/100 dollars (159.38) with interest thereon at six per cent (6%) per annum from this date, and costs and disbursements in the sum of $2.00.

Pratt-Gilbert Company, a corporation.

One hundred seventy-eight and 8/100 dollars ($178.08) with interest thereon at six per cent (6%) per annum from Dec. 14, 1924, and costs and disbursements in the sum of $2.00.

Ezra W. Thayer.

Eighty-five and 20/100 dollars ($85.20) with interest thereon at six per cent (6%) per annum from this date, and costs and disbursements in the sum of $2.00.

Union Oil Company of Arizona, a corporation.

Four hundred fifty-eight and 8/100 dollars ($458.08) with interest thereon at six per cent (6%) per annum from Jan. 1, 1925, and costs and disbursements in the sum of $2.00.

Benson Lumber Company, a corporation.

Five hundred twenty-one dollars ($521.00) with interest thereon at six per cent (6%) per annum from July 1, 1925, and costs and disbursements in the sum of $2.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any payments made by or on behalf of the defendant Phoenix-Tempe Stone Company in satisfaction of or partial satisfaction of any of the amounts herein found due the above-named cross-defendants, or any of them, such payments so made shall be credited upon the judgment

herein rendered in favor of plaintiffs, DeWaard & Sons, and against the Phoenix-Tempe Stone Company, provided, however, that before any credit for such payment shall be allowed, a receipt for such payment shall be filed herein and a proper release in the amount of such payment duly entered upon the records.

Done in open court this 27 day of May, 1926.

F. C. JACOBS,
Judge. [214]

[Endorsed]: Filed May 27, 1926. [215]

[Title of Court and Cause.] [216]

BILL OF EXCEPTIONS.

Be it remembered that on the trial of this cause in this court on the 16th day of April, 1926, before the Hon. F. C. Jacobs, Judge presiding, all of the parties above named appeared except Benson Lumber Company, Jules Vermeesch, Redmond Toohey and Ezra W. Thayer. All of the parties appearing announced ready for trial. The cross-complaint was dismissed as to Redmond Toohey, said Redmond Toohey having been brought into the case by said cross-complaint.

Crouch and Sanders as attorneys for the plaintiff thereupon stipulated in open court on behalf of said plaintiff that each and every one of the claims for material or labor of any of the cross-defendants to the suit except Benson Lumber Company, Jules Vermeesch and Ezra W. Thayer,

were just claims against the plaintiff; that all of the materials alleged to have been furnished by said respective claimants were used by plaintiff in and about the performance of the work described in the complaint and were of the reasonable value alleged, and that none of the same have been paid; and as to the Benson Lumber Company, it was stipulated by counsel for plaintiff that said company had furnished materials which had been used in and about the performance of the work described in the complaint, of the reasonable value of $509.00, and that the claim has not been paid; and as to Ezra Thayer, it was stipulated by counsel for plaintiff that he had a valid claim for material and labor in the sum of $85.20, which has not been paid; and it was further stipulated by Crouch and Sanders as attorneys for the cross-defendant Standard Accident Insurance Company of Detroit on behalf of said Standard Accident Insurance Company, that it should be bound by the stipulation theretofore made on behalf of its principal, the plaintiff, but that said stipulation should not preclude it from taking objection or exception [217] to being brought into this suit or to having the respective claims established in this suit, it being specially stipulated that the motion of the said Standard Accident Insurance Company for dismissal of the answers and cross-complaints of said various material and labor men, and each and all of them, for the reason that their claims could not be legally litigated in this action, and for the dismissal of those por-

tions of the amended cross-complaint of the Phoenix-Tempe Stone Company which set up the fact that these parties hold unpaid labor and material claims, should not be affected by this stipulation on behalf of said Standard Accident Insurance Company.

Said Standard Accident Insurance Company further stipulated that said stipulation admitting that said materials and labor had been furnished on the work described in the complaint and cross-complaint as alleged by said claimants, and that the material and labor furnished was of the reasonable value of the amount claimed by said claimants, should not preclude it from objecting or excepting to any judgment against it on the part of said material and labor claimants upon the ground that its liability on its bond is limited solely to indemnifying the Phoenix-Tempe Stone Company for any loss or damage by it sustained through failure of payment of these claims and that it appears by the cross-complaint that no such loss or liability has been by it sustained because these claims and all of them are unpaid.

Kibbey, Bennett, Gust, Smith and Lyman, as attorneys for the defendant Phoenix-Tempe Stone Company and the cross-defendant Maryland Casualty Company, thereupon stipulated and agreed that all of the facts stipulated by Crouch and Sanders on behalf of the plaintiff were true and correct and that all of the claims mentioned in said stipulation of said plaintiff were just and valid claims against said Phoenix-Tempe Stone

[218] Company and said Maryland Casualty Company for the amount admitted in said stipulation of the plaintiff.

There was then offered and received in evidence on behalf of the cross-defendant, L. J. Haselfeld, a copy of the judgment and decree in the action entitled "L. J. Haselfeld v. L. DeWaard & Sons and the Standard Accident Insurance Company," rendered in the Superior Court of Yavapai County, Arizona. Said judgment was admitted as cross-defendant L. J. Haselfeld's Exhibit 1.

There was also offered by said L. J. Haselfeld a certified copy of the bond of the Maryland Casualty Company which was received in evidence as cross-defendant L. J. Haselfeld's Exhibit 2.

It was thereupon stipulated that the additional allegations included in the amended cross-complaint of the Phoenix-Tempe Stone Company might be deemed denied by the plaintiff and that an amendment might be made to the plaintiffs' complaint changing and lowering the amount sued for to $30,017.27.

Thereupon a jury was empanelled and sworn according to law, and thereupon the plaintiff to sustain the issues upon his part offered the following testimony, to wit:

TESTIMONY OF L. DeWAARD FOR PLAINTIFF.

My name is L. DeWaard. 62 years of age. Residing at San Diego, California. Have been by occupation general contractor for 42 years.

(Testimony of L. DeWaard.)

Started when I was 20. Built bridges nearly all of my life, in South Africa, Holland, Portuguese Territory, and many of the states of the United States.

Of notable bridges I have built I may mention the bridge across the Santa Ana River near Riverside, a very difficult construction. Twenty-six bridges for the State Highway Department of California. The biggest construction was the bridge they call Meyers Street Bridge near El Centro. Built a bridge across the San Raphael Heights near San Bernardino, California. [219]

In Arizona the bridges between Kelvin and Ray Highway over Mineral Creek. Between Tucson and Nogales, and other structures scattered over Arizona State Highways. I built bridges in Africa before the war and after. I built the bridge in the East about the South Canadian River in Oklahoma. It was built on the same construction as here, on steel cylinders. I built them for the Washington and Annapolis Railroad between Annapolis and Baltimore. For all of those bridges they had plans and specifications. You can't build them without plans. I have average ability to understand plans.

(Thereupon the blue-prints of the plans referred to in the complaint were admitted in evidence without objection as Plaintiffs' Exhibit 3. Said blue-prints were placed on the blackboard and witness referred to them in his further testimony.)

(Testimony of L. DeWaard.)

On this plan are three test holes. These test holes go down—the test hole is Station 397 plus 45 and show on the plan that it is about one *feet* away from the cylinder. That figure there is ⅛ scale. There is a scale on those plans. (The witness points to the following appearing in the center of the plan, to wit, "Plan scale ⅛ inch equals 12 inches.") The test pit goes to a rock elevation 4,020. The shaded cross-hatching appearing underneath the most right-hand pier upon a plan like this means rock—solid rock. Some more of that cross-hatching appearing in the middle of the bridge is solid rock, and another one over to the left-hand side of the drawing is solid rock. The most right-hand test pit, Station 397 plus 45, means that Station 397 plus 45 is the place where the test pit was dug. That is the longitudinal place on the ground where it was dug. The phrase "Sand and gravel" means that there is sand and gravel between the top of the surface to the rock. It means that going to that point which is marked "Station" of a certain number, you would go through sand and gravel to get to the rock. Where it [220] says "rock el," that means elevation. "Rock elevation 4,020" means the depth where the solid rock is. Up at the top where there is marked "Fin. grade," that is the final grade at the top of the bridge—finished grade. That is 4,051.50. That means that when the work is done, that at that place on the road the elevation shall be 4,051.50. That 4,051.50 is the eleva-

(Testimony of L. DeWaard.)

tion of the top of the road from a certain point they call a bench mark. I do not know what the bench mark or datum plane in this case was, but all the elevations on this work were figured from a certain common level and this common level when finished would have been 4,051.50 feet above that datum plane or bench mark.

The other one you now refer me to below that, riprapping to elevation 4,045, that means that the job for riprapping had to be placed outside and inside for the protection of the wall around the bridge, so that by looking at the plan you could tell just where to commence riprapping. Your finished grade is 4,050. The other line which is above it, the figures 1½ to 1 slope, which shows a line running from an angle down to another line, means the slope of the ground until you get to this ground line.

The line that runs clear across the whole bridge underneath which has a little bit of hatching different from the bedrock hatching is what they call a ground line. It is marked "ground line." It means the existing ground line before the work started in the bed of the creek.

At this test pit, Station 397 plus 45, sand and gravel to rock elevation 4,020 means that 4,020 is the elevation of the rock to elevation for road. The distance from the finished grade down to that bedrock is the difference in the elevation from where the rock is shown to the top of the bridge. The elevation of the rock being 4,020 and the top

(Testimony of L. DeWaard.)

being 4,051.50 would make the distance 31½ feet as shown on the plans. Going to the center test pit, it shows there test pit Station 396 plus 50, sand [221] and gravel to rock elevation 4,023. Computing the distance to the top of the bridge, it would be 28½ feet down to bedrock at the middle pier. According to this plan and these figures, the rock for the middle pier should have been 3 feet higher than for the outside pier.

You will see that the pier—the cylinders—stops at the top of the rock right here to show that your cylinder is built on the rock right here and the top is 10 feet above that rock. It don't only show the rock but shows the bottom of the cylinder. No, the pier don't stand on the center line. The pier is a little out of center. The map shows the center line on both sides of the pier. This represents the center line and also the outside slant of the pier that is built on it. This portion that is marked "A" is the cylinder and that cylinder is one on one side and the other on the other side of the bridge. That part above the "A" running from the "A" up to the bridge which is narrow and which you have called "C," that is concrete. A concrete wall that tied the two cylinders together across from one cylinder to the other as it appears in the drawing just above.

At the point you have marked "D" and the point you have marked "E" are the two cylinders. Between those two cylinders they are connected with a narrow slab of concrete, being the one

(Testimony of L. DeWaard.)

shown below, so that the fact that this lower drawing shows a wider portion at the bottom, indicates to me that this is a cross-section at the side cutting the pier outside from the cylinder showing the foundations of the bridge. That is true at the pier. If this had been a cross-section of the center of the bridge, this line would not have gone clear on down to the same dimensions. It would stop down there. You would not see the pier. You would not see the cylinder. This concrete that is between these two cylinders stops down there at the top [222] of the cylinder, so from that fact I know that this is a cross-section at the edge and the sides show right where the piers are. Without a doubt this rock shown not only under this test pit but going also under the pier makes this drawing show where the rock is under the cylinder.

Yes, by taking the scale to which that drawing is made and taking the elevation of the rock at the test pit you can tell exactly what depth the rock is. Taking the most northern or left-hand test pit which says "Test pit Station 395 plus 70, sand and gravel to rock elevation 4018," it would be 33½ feet from the finished level of the bridge to the bedrock at that station and the bedrock shown is not only under the test pit but also under the cylinder. The line that runs all of the way across on the top of that rock indicates on the map "Rock"—rock elevation.

(Testimony of L. DeWaard.)

The only way where we can base our prices is to take this plan and determine where the rock is supposed to be at all points. That is the only way to bid. That is the proper way of putting such a line on the plan or bridge, just as this other line is marked "ground line." It tells you how the ground is before you start and how deep you have to go before you strike the rock. So that by taking the elevation of this ground line and subtracting from it the elevation of the bedrock line you can tell when figuring on this work just how deep you are and where you have to dig.

There is another line shown on this plan which is marked "high-water line." That high-water line is there to show the contractors where they may be put up apainst it when there is a flood. In case of flood, what the high-water mark is where highest water has been. It is the height of the extreme water. The highest of which there is a record, to show the contractors that the concrete is above the high-water mark. It also shows the [223] contractor the danger when they should have rains. The actual water line on the surface changes but it changes very little in the Arizona streams in general. The ground water is nearly always stationary. The high-water mark will be there and perhaps that water may be there for five minutes and it may be there for half an hour and it may be there for half a day. Explaining the two lines at top, one marked "high-water

(Testimony of L. DeWaard.)

line" and the lower one marked "ground water," the high-water line is the line that has the highest water that there has been any record—that is known of in the State Highway Department. That is called storm water, the highest water that there has been in the river, and "ground water elevation January 17, 1923," would be the ground water. That means that the water that comes up from the ground that is not affected by rain or other weather conditions. Water that is supposed to be there. That is the line that is supposed to be a stationary line. That line is below the top of all of the cylinders so that if the ground water line had been as shown upon the plans when we built the cylinders, we could have installed them without water going over the top, for the cylinders are water-tight and riveted together, and the ground water could never come over the top of the cylinders.

The bottom part of the detailed drawing marked "Section ONCL" is the steel cylinder filled up by concrete the same as you see here on the plan, and the next part is the concrete on top of the cylinders forming the pier on which the bridge will rest. And this is the top part to form the side of the girders that go across like that. There is steel dowels going in the bottom of the cylinders drilled in the rock to tie the cylinders up to the rock—the concrete footing. The cylinders are set down six inches in the rock as shown on the detailed drawing, and when they are in the rock, we drill

(Testimony of L. DeWaard.)

holes in the rock and put them dowels in steel square about two feet in the cylinders [224] in the concrete that goes in the cylinders to tie the cylinders to the rock. You take steel four feet long and drill holes down in the bedrock 18 inches or two feet and put the steel in these holes and then fill the holes and the whole cylinder with concrete. Then you have also the steel that goes in on top of the cylinders. In the cylinders themselves there is no other steel. They are filled up by concrete. Then you put steel in that goes right from here. What you see in this detail (Referring to the detail marked "F") here, that shows the rock dowels, four on each cylinder. Then you have from that pier that steel straight up to the bridge side. Yes, this indicates that there are steel rods in the cylinder itself. They are the same rods tied to the rods that are in the bottom and go straight up. Yes, there is steel goes up in the center of the cylinder. It goes right up to the top of the bridge to this elevation as shown in this drawing marked "G." The Tempe Stone Company furnished that steel. Not all of it was cut into lengths. This was cut to length—the lengths given on the plan. We furnished the cylinders. The lengths are laid down in the specifications—ten foot long—14 cylinders 10 foot long, total 140 feet. Specifications give ten foot long. Here is the plans for that.

(Thereupon the document entitled "State of Arizona Highway Department Specifications for

(Testimony of L. DeWaard.)

the Construction of the Prescott-Phoenix Highway White Spar Congress Junction Federal Aid Project No. 72–A" was offered in evidence and received without objection as Plaintiffs' Exhibit 4, Mr. Crouch in behalf of plaintiff stating that he offered the whole document.)

There were 14 of those steel cylinders on this job 10 feet long each. The length of those cylinders shows on these plans. I am referring to where it says "Four foot five by ten feet cylinders." Fourteen of them with a total length of 140 feet as stated in this proposal specification. That is the size we [225] manufactured and bought and delivered on the job and put in the bridge. The diameter of those cylinders was four foot five inches. It was impossible to build the bridge with those cylinders of that length without changing the type of construction. The bridge was not built with 10-feet cylinders without changing the plans, for the plans were changed. They changed the plans because the cylinders had to go deeper in the ground to find the bedrock. We considered to lengthen the cylinders but that was changed and put a square block of concrete on top of the cylinders to build them up to level them off to the same height and then built the other construction on top of that square block of concrete. The plan does not show any such type of construction as that.

It was in the beginning of September or the latter part of August, I am not sure, when I first

(Testimony of L. DeWaard.)

ascertained that bedrock could not be found at the elevation shown on the plans. We ascertained that fact by sinking the cylinders, and when we came to that elevation as given in the plan, we notified the engineer there was no rock. Mr. Bunker was in charge of the work at that time as my superintendent. He notified me as soon as he found out that the bedrock was not at the depth shown on the plans by telegraphing and writing me. Upon being notified that the bedrock was not at the depth shown on the plans, I notified the Tempe Stone Company by telegraph. I also notified them by letter and verbally, too. I was in their office in Phoenix.

(Thereupon letter dated October 4, 1924, from plaintiff to Phoenix-Tempe Stone Company was admitted in evidence without objection as Plaintiffs' Exhibit 5.)

The equipment which I had at the job was amply sufficient to take care of the water had bedrock been encountered at the places shown upon the plans. We provided for all of that. We [226] have a list of equipment here. We sunk all of the piers to that elevation—that is, to the elevation that shows here (indicating the plans). On only two piers, I think, did we find rock at the elevation shown. Those two were on the shore. The first pier that we sunk we could do with a 2-inch pump. When we had to go deeper we had to increase our equipment for 2, 3, 4, and 5 inch pumps, and one time we could not cope with even

(Testimony of L. DeWaard.)

a 3, 4 and 5 inch pump. We could not get the water out of one pier. We pumped one stream of water five inches in diameter, another four inches, and another three inches, with the equipment that we had, in an effort to sink those cylinders down to bedrock. We could not handle the water. To sink the cylinders down to the elevation shown on the plans, we had only a 3-inch hose.

(Thereupon two sections of the hose stated by plaintiff to have been used in an attempt to go down below the bedrock to try to find it were received in evidence as Plaintiffs' Exhibits 6 and 7. Thereupon letter from Phoenix-Tempe Stone Company to plaintiff dated October 9, 1924, was received in evidence without objection as Plaintiffs' Exhibit 8.)

Prior to the receipt of that letter we had received no complaint from the Phoenix-Tempe Stone Company that our equipment was not ample. When we started we had between ten and twelve thousand dollars' worth of equipment.

(Thereupon a paper entitled "List of Equipment sent to Arizona Job" was received as evidence without objection as Plaintiffs' Exhibit 9.)

This list shows only a part of the equipment amounting to $3,741.90 worth. We shipped besides the list the mixer from Big Bear Lake Bridge. We bought a new mixer here in the city and sent it up there. We bought a gas-engine

(Testimony of L. DeWaard.)

from a man that has a bill in here that has been paid, and we shipped equipment [227] here from a job in San Diego. One crusher that I brought here was part new. It was worth $3,000.-00. We had plenty of equipment there until we were required to go down below the place where the rock should have been found.

(Thereupon copy of letter from plaintiff to Phoenix-Tempe Stone Company dated October 11, 1924, was received in evidence without objection as Plaintiffs' Exhibit 10.)

I gave to them in the office a copy of the bill for extra work. I have it here.

(Thereupon a paper entitled "Extra cost of sinking cylinders Kirkland Bridge deeper than shown on plans" was received in evidence without objection as Plaintiffs' Exhibit 11.)

They did not take any notice of this bill. I handed it to the bookkeeper in their office. They did not allow it in the October estimate. On the 20th of October Mr. Conway came up to the bridge. Mr. Van Dorn was up to the bridge and there was quite a dispute as to those cylinders. Mr. Conway said he would not pay in very strong language—he would not pay a penny for it. He said, "You get not one damn penny." He said, "You have to go to any depth you find the rock." He said, "You are bound by your specifications and I don't care how deep you have to go and you won't get any extension of time and you won't get a penny for it," and besides that he says, "I hold you respon-

(Testimony of L. DeWaard.)

sible for all engineering fees, for expense of time that may be caused when you go over beyond your time," and then Van Dorn walked away. It was quite a hot argument, and after Van Dorn walked away he said, "Before I am through with you, you are through in Arizona. You won't come back to Arizona." Mr. Conway is president of the Phoenix-Tempe Stone Company. Mr. Grant, resident engineer for the State Highway Department, was there at the time. I discussed with Mr. Grant the matter about the cylinders. What I talked to Grant about [228] was that they said that the plans did not show the rock, and he could not say anything and we had to go to the Tempe Stone Company. Mr. Grant and Mr. Kline—Mr. Kline is the engineer for the Federal Aid, and Mr. Hoffman, the bridge engineer for the State Highway, were up there one time and admitted that it should be paid for—the extra depth—and at that time it was considered to lengthen out the cylinders to make them longer. That day when Mr. Grant the engineer was out there, they found out they could not build that bridge according to that plan and they then devised a scheme or plan for lengthening out the cylinders by some sort of concrete or arrangement on top of them. I will explain how that was done. When this cylinder, for instance, went down four or five feet or two or three feet or any depth below this plan, they considered to build 4x4 square piece of concrete on top of this cylinder, for instance, to level up with that cylinder to make

(Testimony of L. DeWaard.)

one pier. Say this cylinder goes down two feet deeper and that cylinder goes three feet deeper. It would make this cylinder one foot below that one and then they put a piece of concrete on here to build this concrete on a level line. If this cylinder goes six feet deep, and then we put one foot on this one to make that abutment level, to have the two piers on a level. If they both went down to the same depth, they would not put any on it—just build a wall on it—on top of the cylinder. In that event the wall would be higher. That was the discussion that happened later on. I don't know what they did when the Tempe Stone Company got hold of it. Every time I saw them I just kept hammering on them to give written orders for that extra work.

This is a copy of a telegram sent on the 14th of September to Mr. Bunker, my superintendent, regarding the necessity of getting written orders for this extra work.

(The telegram was offered in evidence by plaintiff to which [229] defendant objected on the ground that it was a self-serving document and immaterial and irrelevant. The objection was overruled and the telegram admitted over the objection as Plaintiffs' Exhibit 12. Defendant took exception to the ruling admitting the telegram.)

In that telegram I was referring to clause "F" on page 42 of the specifications and to paragraph "A" reading as follows: "When so directed in writing by the State Engineer, the contractor shall

(Testimony of L. DeWaard.)

furnish materials and do extra work not authorized or provided for by the terms of this contract but which may be connected with or necessary to the proper completion of this work." In order to properly complete that work or to build it at all with those cylinders, it was necessary, first, to go down below the rock elevation shown on the plans and, second, to build that 4x4 slab on top to lengthen out the cylinders. Neither of those classes of work were shown on those plans and that was why I wanted written authority to do that and I was sure that if I did not get that in writing that I could not get paid for it. They did not give it to me. In this letter I reported that I had sunk one of these cylinders four feet deeper than shown on the plans and asked them for authority to make the change in construction, in writing, in this letter of October 11th. They did not answer this letter.

(Thereupon counsel for defendant was asked if they had a copy of any answer to the letter of October 11th. Counsel for defendant replied they had no such copy but that they had Mr. DeWaard's admission of receiving the answer and thereupon handed to counsel for plaintiffs letter of October 27, 1924, from plaintiff to Mr. W. W. Lane, Chief Engineer Arizona State Highway Department which was thereupon offered by plaintiff and received in evidence without objection as Plaintiffs' Exhibit 13, said letter consisting of two parts, each signed By L. [230] DeWaard for DeWaard and Sons.)

(Testimony of L. DeWaard.)

It may be that they acknowledged receipt of my letter of October 11th, but I can't remember that I received a letter in reply to that letter. They came out to talk to me about working on the cylinders fighting water, sand and gravel, on the 20th of October, that is nine days after I wrote the letter of October 11th. During those nine days I was just trying to keep on—hammering to get through. We wanted to finish our contract. I have a detailed report what the men were working down there every day. They told me in plain words that I would not get a blank penny for it. There wasn't any doubt about it. I did not agree with them. The cylinders were too short. I did not lengthen them but I did build those squares to make caps on some of them. When we sunk them we put some sand sacks on the top in the water. The cylinder was below the water and the water come in and we built some sand coffer-dams around to hold the water out and then we built the square. I told them in this letter that it looked like I would have to get an orange peel. It is like the half of an orange that has blades here come up in four and they are round—and that grips the sand and gravel and you can dig under water. Then if the cylinder will sink to the rock when you weigh it down, you can pour your concrete under water so you can seal the bottom and then you can pump it out if you want to and the bottom is sealed and fill it up to the top. That is an expensive machine. I would not have needed an orange peel if the bed-

(Testimony of L. DeWaard.)

rock had been at the height shown on the plans. No, we did not strike rock on the depth shown on the plans on cylinders 6 and 7.

(Thereupon letter by Phoenix-Tempe Stone Company to plaintiff dated October 16, 1924, was received without objection as Plaintiffs' Exhibit 14 and a copy of reply by plaintiffs to said letter was received in evidence without objection as Plaintiffs' [231] Exhibit 15. Thereupon plaintiff offered in evidence a telegram from plaintiff to Mr. Bunker, plaintiffs' superintendent, dated September 18th. Defendant objected to the admission of said telegram on the ground that it was a self-serving document and immaterial and irrelevant. The objection was overruled and the telegram admitted as Plaintiffs' Exhibit 16. Defendant noted an exception to the ruling in admitting said telegram in evidence. Thereupon plaintiff offered in evidence copy of a letter written by plaintiff to Phoenix-Tempe Stone Company dated October 18, 1924, which was received without objection as Plaintiffs' Exhibit 17. Thereupon plaintiff offered in evidence a letter from Phoenix-Tempe Stone Company dated October 23, 1924, transmitting a copy of letter from the Highway Department dated October 22, 1924. Both letters were admitted without objection as Plaintiffs' Exhibit 18. Thereupon plaintiff offered in evidence copy of a letter dated October 27, 1924, by plaintiff to Phoenix-Tempe Stone Company. This was received in evidence without objection as Plaintiffs' Exhibit 19.

(Testimony of L. DeWaard.)

I never got any written authorization for the change covering the revised price per foot for unencased cylinders. I demanded a written order to go deeper from the Phoenix-Tempe Stone Company.

It was necessary for them to make the fills at the Kirkland Bridge in order not to delay our work, because the abutments were about 50 feet from the road and we had to haul our concrete over that on the completed part of the highway to get to our bridge.

We did not have a contract for the grading. We had built the abutments on each end and wanted the place behind them filled with dirt so we could haul the concrete for the floor of the bridge over the road. Besides that, we had to prepare the [232] riprap shown on the plans on the fill to be made by the other contractor. So long as the subcontractors did not make the fill, we could not make the riprap. They did not make the fill right away when I wrote them that letter (Exhibit 19). I do not remember that they answered this letter. As far as I remember it was two months afterawrds when they made this fill. I am not exactly sure of the date. Yes, the building of the bridge was made more expensive and troublesome by reason of the fact that those fills were not made. We had to build a structure over the gap to come to the bridge and our mixers had to set further from the bridge. That is a true and correct photograph of the bridge.

(Testimony of L. DeWaard.)

(Thereupon photograph of the bridge was admitted as Plaintiffs' Exhibit 20.)

This photograph is an accurate photograph of one end of the finished structure.

(Thereupon photograph was admitted as Plaintiffs' Exhibit 21 without objection.)

I did not put the bridge in that condition (referring to Plaintiffs' Exhibit 21). That is another correct picture of the finished structure.

(Thereupon said photograph was admitted as Plaintiffs' Exhibit 22 without objection.)

We built two cattle guards which are not a part of our contract. Mr. Van Doorn and Mr. Grant requested us to build them. They gave us no written authority. They paid us for it except that they held back 10%.

(Thereupon letter from DeWaard and Sons to Phoenix-Tempe Stone Company dated October 27th, was received in evidence without objection as Plaintiffs' Exhibit 23.)

Referring to the statement in said letter (Plaintiffs' Exhibit 23), the Phoenix-Tempe Stone Company had received this [233] money from the state for the work done by those mules and had not paid us for it and were criticizing us because we had not paid the McGrath Mule Company.

(Thereupon letter dated October 31, 1924, from W. W. Lane, Chief Engineer, to Phoenix-Tempe Stone Company, was received in evidence without objection as Plaintiffs' Exhibit 24. Thereupon the letter by W. W. Lane, Chief Engineer, to Phoenix-

(Testimony of L. DeWaard.)

Tempe Stone Company, dated October 31, 1924, was received in evidence without objection as Plaintiffs' Exhibit 25.)

We did not receive a written order authorizing us to make the change which they were authorized to make by the state. I asked them for orders to go deeper. I wanted to have an order that they would build the bridge deeper. That would protect me. I understand that in this letter from the State Engineer to the Phoenix-Tempe Stone Company where they say "in the event this alternate is desired," the alternate referred to is changing the foundation, making an alternate price and making an alternate construction. Not being able to build it according to the plan, they devised an alternate way to build it and they gave this authority to the Phoenix-Tempe Stone Company and suggested that they make a supplemental agreement about it, but we were not able to get any such written order or supplemental agreement out of the Phoenix-Tempe Stone Company to protect us.

(Thereupon a letter from F. M. Grant to the Phoenix-Tempe Stone Company dated October 28, 1924, was received in evidence without objection as Plaintiffs' Exhibit 26.)

So far as I know these boxes (referring to Exhibit 26) were built according to the revised plans.

(Thereupon letter from Phoenix-Tempe Stone Company to DeWaard and Sons dated November 6, 1924, was received in evidence without objection as Plaintiffs' Exhibit 27.)

(Testimony of L. DeWaard.)

At this time the State Engineer threatened stopping the [234] work unless he could come to an agreement with us as to the price we were to receive for this additional and different work.

(Thereupon the reply of November 10, 1924, of DeWaard and Sons to Plaintiffs' Exhibit 27 was received in evidence without objection as Plaintiffs' Exhibit 28.)

At that time the controversy had narrowed down between us to this: That the State and Phoenix-Tempe Stone Company claimed that we should go on down to whatever depth it was necesary for us to go to find bedrock and receive pay at the same price for excavation that we would have received on our bid for the short depth, and that we contended that that work below the ground line was more expensive and a different class and kind of work and came under the extra work clause of our specifications providing that we should do it at cost plus 10%.

(Thereupon letter dated November 24, 1924, from DeWaard and Sons to Phoenix-Tempe Stone Company, attached to which was an estimate of the cost of sinking cylinders deeper than shown on the plans up to that time, was received in evidence, together with attached statement, without objection as Plaintiffs' Exhibit 29.)

The item of $692.16 (referring to statement attached to Exhibit 29) represents only the labor of sinking the cylinders deeper than shown on the plans for cylinders 10, 12, 8, 7, 5, 6, without any profit

(Testimony of L. DeWaard.)

or liability insurance or other expenses. It actually cost us $692.16 for wages paid out in sinking those cylinders below the depth shown on the plans as bedrock. This did not include the ones that yet had to be sunk in the center of the stream. We had to get additional equipment for that, and additional material and equipment and pumps and we got the additional equipment and tried to get them down and we could not get them down. The $692.16 is actual money paid to those men putting those cylinders down and would be approximately [235] twenty times the unit price per square yard.

If we have to sink the cylinder deeper than ten feet, we do not get any payment for it at all for the reason that we only get paid for the part of the concrete that we put on the top of each cylinder, but we got only paid for what the concrete cost us. You see, we do not get the concrete for nothing. We have to put it down there additional so there is only one dollar profit in putting that additional concrete on top of that pier. Then we had to sink that whole pier deeper for that one dollar.

The Tempe Stone Company paid a unit price for that concrete that goes on top of the pier. We get approximately 15% less than the Tempe Stone Company gets for that concrete. When we sink the pier that we consider extra work, then we add the cost plus ten per cent; that means, we make ten per cent profit before sinking that pier deeper at all. The Tempe Stone Company don't get anything of the ten per cent. It is not to the interest

(Testimony of L. DeWaard.)

of the Tempe Stone Company to do that on that basis, and I make a dollar profit out of that and I might lose a thousand dollars. That is the whole controversy about this price. When we sink that pier deeper, we do it for actually nothing. All that we get paid for is the concrete. We have to make forms for it and we have to put it in place. That extra from that goes on there costs money and then we put an extra yard of concrete on it and they give us $13.00. That extra yard of concrete made it cost us $23.00 and we have to start the mixer for one yard of concrete; besides that, sink the pier down for nothing to the depth they want us to go and we have to put concrete on top of it to bring it to the level of the grade, and all that extra above that they demand us to do would be work and dead loss and there is nothing provided. We would not be paid one penny for it as a profit. [236]

For digging for that additional depth we would be paid nothing but just for the concrete that would come on top of the pier. The price bid by us for concrete, as I recall, was $13.60 or $15.60. Yes, I take it from the letter of the State Engineer where it refers to the sinking of the cylinders that the price paid will be for the footage basis at the price bid, and the estimates will be made measuring the footage of the cylinders actually placed. That is all we get for having to go deeper. They were going to make us build the forms and put it in the top of those cylinders and be paid the same price

(Testimony of L. DeWaard.)

that we would get for pouring the concrete in the cylinder and then deduct the price of the steel cylinders from that.

The extra work clause that I refer to is that found on page 42 of the specifications providing that "when directed in writing by the State Engineer the contractor shall furnish materials and do extra work not otherwise provided for by the terms of this contract but which may be connected with or necessary to the proper completion of the work," etc.

(Thereupon a letter from Phoenix-Tempe Stone Company to DeWaard and Sons, dated September 9, 1924, was received in evidence without objection as Plaintiffs' Exhibit 30.)

The box culverts in Peoples Valley (referred to in Exhibit 30) were constructed directly when we got notice from the Engineer of the highway to construct them. They were more or less delayed in the latter part through the action of the bridge, the men from the bridge, and the communication between the bridge. The material and equipment in the one part of the work would hamper the other part and suffer through it. The men go backwards and forwards; work for one part and work down there and go back again. We came to an understanding with the full permission of the resident engineer to let the subcontactor finish this road, that we could come to the culverts, [237] fill the culverts up, make a little detour, excavate them, for our own costs, and construct them directly when you want

(Testimony of L. DeWaard.)

them. There was another subcontractor who was doing the grading on this work. This was Roger Wallace Company, and we had an arrangement with them whereby we put the culverts in as they wanted them, and then we gave them permission to haul the pipe out for that and when they go along with the grader lay the pipe for us if we paid them, and they did all of that work without any complaint. We were ahead of the grading contractor all the time.

We received a letter from Mr. Grant and we moved all the forms down there and built the culverts. That was only when they asked us to build a certain culvert. There was no complaint. Mr. Grant asked the Tempe Stone Company to build that culvert at once and the Tempe Stone Company mailed that letter to us and we built that culvert at once. We complied exactly with the letter but we have never received an order from the Tempe Stone Company that we were behind with our work. This letter that we got complaining about not putting in the culverts was the first complaint we had ever received either from the Phoenix-Tempe Stone Company or any grading contractor. Up to that time we were keeping entirely out of the way of the grading men. They were in the way of us with some work. They were in our way and not we in theirs.

The total cost of the entire work, based upon the plans and specifications, according to my figures, as per the quantities given in the specifications,

(Testimony of L. DeWaard.)

would be $42,176.73. The percentage of the entire contract which was completed before it was taken over by the Phoenix-Tempe Stone Company was approximately 85%. It may be between 80 and 85%. That means completed; that means the work that was half completed, too. The uncompleted portion of the bridge itself should amount to $1,518. [238] That is taking in consideration that all of the form lumber was on the site, part of the false work on forms completed for pouring concrete, part of the rock and sand ready for pouring, and all cylinders were sunk at the depth or deeper than shown on the plans. The uncompleted portion consisted of filling four cylinders, building one pier on top of the cylinders, pouring the floor of the bridge—about 50% of the forms for pouring the floor were ready for pouring. The steel was partly in the floor and the girders laid and the other steel was bent, so far as I recollect, for the whole bridge.

Yes, sir, if it was built according to the plans, I could have finished the bridge within the time specified in the contract. At the time the defendant took the contract over from us the work should have been completed long ago. I could have built the whole bridge long before the time expired when it should have been built, according to the plans. I could not have completed the work within the time between the time when the defendant took the work over from me and the time that the contract would expire. According to loss of time on rainy days

(Testimony of L. DeWaard.)

and water in the creek or delay in waiting for orders, we had about 62 days to go. I should have had 62 days extension of time on account of their delay in giving us written orders and rainy days. The reason of that loss of time was some rainy days we could not work from flood in the creek—the water holding up on the foundation, and waiting for orders from the Phoenix-Tempe Stone Company. At the time this work was taken away from us there were other subcontractors working, grading and surfacing the road and working on the approaches of the bridge.

Besides the building of this bridge, the other work which we were to do consisted of making cattle-guards, laying pipes, building head-walls for the pipe, making culverts, making other [239] bridge 40 feet, making fords. We were to make three cattle-guards. I believe when they took the contract away from us we had made seven. They simply ordered me to put the additional ones in. We hauled all the material to the work for ten cattle-guards. Besides that, we had to build some fences along the road. They were shown on the plans as part of our contract. We could not construct the fences because the grading contractors did not have the surfacing done and the road was not ready. These fences were just where you had big curves and where you had big fills. I think we had about 40 culverts to build. The time when they took the work away from us 7 were uncompleted and 3 fords were uncompleted. At the time

(Testimony of L. DeWaard.)

when they took the work away from us I could have finished the whole work, with the bridge included, in six weeks. I could have built the whole bridge in six weeks. Well, I will say it would have taken six weeks to have finished putting in these three fords and seven culverts and other uncompleted work besides the bridge. It could have all been completed at the same time and it should have been completed in the same way for the reason that you can haul your men back and forth and use the same crew.

On December 9th the work on the Kirkland Creek Bridge had practically stopped because I could not do any more. We had no orders to sink these piers and the false work was up and ready for pouring and the half section of the bridge but the floor was ready to pour the floor, and it was in a very dangerous condition to pour on half of the bridge without having the other foundation installed, and every pier was down below the elevation shown on the plans.

(Thereupon letter by Crouch and Sanders, attorneys for DeWaard and Sons, to Phoenix-Tempe Stone Company, dated December 11, 1924, was received in evidence without objection as Plaintiffs' Exhibit 31.) [240]

It was true that we had been delayed in the execution of the work in Peoples Valley a little over two months then by other subcontractors. When we started in Peoples Valley to put up a camp down there we had to lay the pipe in the road and

(Testimony of L. DeWaard.)

there were some big excavations to make in the sidehill. The subcontractors had to blast down there and we had to blast or excavate for the pipe, too. The excavation for one point, perhaps, is ten feet on one end of the pipe and a little fill on the other end of the pipe. When we could not do that, the other contractors were working blasting down there. We could not work at the same time. The other parts they were not working we had to wait until we could come to it. The rock and sand was screened. We hauled all of the pipe out on the works. Some of it we hauled to the places and opened one culvert to have 70 yards of rock and sand laying down there and the subcontractor come and used that up in the fill. After that we stopped work on Peoples Valley to come to an agreement with the subcontractor. That subcontractor was Gore and Maze. The understanding we had with them was that we wait until we had the road graded and we could go over the graded road and haul the sand and gravel and material over the graded road. I am not sure whether the State Engineer knew anything about that understanding. The Phoenix-Tempe Stone Company knew all about it. Mr. Van Doorn knew about it. Mr. Van Doorn never kicked. They never kicked to me about any of the work. Then we went and made the same arrangement with the subcontractors in Peoples Valley. Gore and Maze were on the North end and part of the South end of the bridge and the other subcon-

(Testimony of L. DeWaard.)

tractors, Willis Rogers, were in what they call "Peoples Valley."

I went down there personally, and we did make arrangement with this subcontractor that any time they would wait for us to lay the pipe, excavate the pipe for us, lay the pipe and we [241] pay them for it. By that agreement we hired them to do the excavating necessary for the laying of our pipes in the road. They were to do this excavating whenever they needed it and we were to pay them for it. We did not have a bit of trouble with the subcontractors claiming that we were not getting our work and holding them up and delaying them. The Phoenix-Tempe Stone Company knew of these arrangements with the subcontractors. Mr. Van Doorn knew it and it was agreeable to him. At the time I wrote this letter there was three feet of water running under the Kirkland Bridge according to the reports that I received from the superintendent.

(Thereupon letter from DeWaard and Sons to Phoenix-Tempe Stone Company dated December 17, 1924, was received in evidence without objection as Plaintiffs' Exhibit 32.)

Under the contract that we had with the Phoenix-Tempe Stone Company we were to be paid on the 20th of each month for work done in the previous month. On the 19th of December, 1924, I owed Haselfeld a bill of, I think, $835.00. No, not $2,000. That $2,000.00 was in different claims come together in one bill. All of the people around there put the claims in to Mr. Haselfeld to ask the Tempe

(Testimony of L. DeWaard.)

Stone Company for payment and all of them together amounted to something like $2,000.00. I owed Mr. Haselfeld a bill of some seven or eight hundred dollars and I gave him an order on the Phoenix-Tempe Stone Company. I am not sure when, on the 10th or 12th or 14th, but before the 20th. I know he presented that order to the Phoenix-Tempe Stone Company and the Phoenix-Tempe Stone Company did not honor it. Mr. Haselfeld told me they turned it back to him. I don't think that is what started the suit.

One of the claimants told me that Van Doorn came down there and asked him if we did not owe any bills around there, and he advised them better to have these bills in before the 20th, and [242] then I gave them an order for the full amount that the Tempe Stone Company could pay the full amount for all the claims. They telegraphed that they did not have the money. They told them they did not have the money and they had the money in their pocket and they had received the money at that time from the State Highway. The Phoenix-Tempe Stone Company at that time owed me approximately $4,600.00. That was on the previous estimate for work done up to November 1st. I might add that they owed me much more, but that is money that they allowed me, but they did owe me perhaps seven or eight thousand dollars more that I never got an account for it. They have to pay monthly estimates, you see, on work that we completed up to that time of about seven or eight thou-

(Testimony of L. DeWaard.)

sand dollars in excess of work. The engineer's estimates were not in full for all the work that we had done, but merely *were allow* me so much. In addition to that, the Phoenix-Tempe Stone Company retained 5% of all previous work and I had not received any pay for these extras, and in addition to that they owed for the work done from December 1st to December 20th. Yes, I mean they owed me approximately $7,000.00.

(Thereupon letter from Phoenix National Bank to DeWaard and Sons dated December 19, 1924, was received in evidence without objection as Plaintiffs' Exhibit 33.)

The claim (referred to in Exhibit 33) was about $237.00. I authorized the bank to pay it. It was paid. The Phoenix-Tempe Stone Company kept the four thousand and some odd dollars which was due us according to the estimate on the 20th of December. It was the understanding to put that in the bank on the 20th. It is customary among contractors on jobs to use the estimates as they come to pay their pay-roll. They did not serve me with any notice prior to the time that they actually held up this money that they were intending to do it. All of [243] the months before they put this monthly draft in the bank on the 20th in order that it might be there to meet my checks. I expected this to be in the bank on the 20th. On pay-day I made all of the checks out for the laborers on the bank and I received on the 23d or 24th of November a telegram from the bank that the Phoenix-Tempe Stone Com-

(Testimony of L. DeWaard.)

pany had not deposited the check in my bank for the reason that the money was attached with the Tempe Stone Company and at the same time I received notice from all over the country that had cashed my checks from different stores that the checks had come unpaid from the Phoenix National Bank. I sent Bunker in a hurry to go all over, to Prescott, to Phoenix, to try to locate the checks and sent them cash, and he took up the outstanding checks for nearly $2,000.00. It cost me nearly a thousand dollars to have checks back and telegrams and everything. Besides, my credit was very much impaired and I had to get money away from other jobs to attend to this business. The excuse they gave for not putting the $4,000.00 in the bank the day it was due was that it was attached. They had received from the State Highway $4,006.00 for work that I had done. The sum total of all the attachment suits against them, as far as I know, was $2,200.00, and they made the return on the attachment that I did not have any money—that I did not pay Haselfeld—and they had previiously an order from me to pay these various claims. The estimate was $4,625.00. I am not sure of the exact amount in dollars and cents, but it was approximate, so that they could have kept out enough money to have answered all of those attachment suits and still have enough money with no claims on it to have paid every cent I drew.

Additional equipment on the work that was not

(Testimony of L. DeWaard.)

on the list I testified to yesterday and that I looked up last night is the following: [244]

A new Ford truck bought from Ed Rudolph and Company in Phoenix, $886.76; on October 24th, another new truck, for $807.78. We did have a 2½-ton truck that was worth $3,000.00. We bought a concrete mixer that was worth $650.00. We bought on October 22d a new mixer from Legg, Taylor and Company here in Phoenix, and some wheelbarrows from the same firm. We bought from agents for the Fairbanks-Morse a new gas-engine with suction hose and pump for $353.00. We had a Pierce-Arrow Truck from the Department of Agriculture that was worth $4,000.00. This is a truck that came from Big Bear where we were building the bridge. We got practically new Oxford concrete mixer worth $850.00. We bought also three American centrifugal pumps with 6 H. P. gas-engine and then we bought from Haselfeld 15 H. P. gasoline engine for $250.00. Total equipment additional to what I have submitted to the court, $12,280.94.

All of that equipment has been used on the job after October 9th and was in use on the work until there was no more work for this equipment. The truck had hauled all of the material that was needed for the job, and at that time there were four concrete mixers in good shape and one that was not in so good condition. There was only work left for one concrete mixer when the Tempe Stone Company took away the contract.

(Testimony of L. DeWaard.)

I offered to arbitrate all of these differences with the Tempe Stone Company twice prior to bringing this suit, once verbally and once in writing. That was before the expiration of this contract. I asked the first time on October 20th to arbitrate the questions, and I offered to leave it even to the Phoenix engineer. That was verbal, and then in writing about the latter part of November.

(Thereupon telegram from DeWaard and Sons to Phoenix National Bank dated December 23, 1924, was received in evidence without objection as Plaintiffs' Exhibit 34.) [245]

When we took that contract Mr. Conway asked me, "How are you going to finance this?" and I said I had an account before with the National Bank of Arizona and with The Valley Bank, and he said, "Well, I am connected with the Phoenix National Bank. If you can put it in down there and I can deposit the money in the bank down there," and I said, "Sure, it is all the same to me." And Mr. Baker went and introduced me to the bank down there and then it was agreed to put the monthly estimates in the bank down there on the 20th so that I could draw. One estimate they asked in particular to mail to my office in San Diego. That is the agreement I referred to in that telegram. There wasn't any special agreement as to this particular estimate. The arrangement was as to all the estimates.

(Thereupon telegram from Phoenix National Bank to DeWaard and Sons dated December 22,

(Testimony of L. DeWaard.)

1924, was received in evidence without objection as Plaintiffs' Exhibit 35.)

(Thereupon telegram dated December 23, 1924, from DeWaard and Sons to Phoenix-Tempe Stone Company was received in evidence without objection as Plaintiffs' Exhibit 36.)

(Thereupon reply of Phoenix-Tempe Stone Company to Plaintiffs' Exhibit 36 was received in evidence without objection as Plaintiffs' Exhibit 37.)

(Thereupon reply of DeWaard and Sons to Plaintiffs' Exhibit 37 was received in evidence without objection as Plaintiffs' Exhibit 38.)

One assignment to Haselfeld was sent back because they said it was not properly assigned, and they sent another to sign and I signed it and mailed it right back. This Haselfeld suit was the only suit at that time that I know and that had been started and I was proposing to assign that so they could pay it. I did not have any objection to letting them pay it [246] at all. The people were entitled to the money.

(Thereupon letter from DeWaard and Sons to Phoenix-Tempe Stone Company dated December 31, 1924, was received without objection as Plaintiffs' Exhibit 39.)

We had wired them offering to arbitrate. We sent telegrams to all the creditors.

(Thereupon copy of telegram to creditors was received in evidence without objection as Plaintiffs' Exhibit 40.)

(Testimony of L. DeWaard.)

There is no date on that telegram. It was sent the same date as the letter was.

(Thereupon letter from DeWaard and Sons to Phoenix-Tempe Stone Company dated December 23, 1924, was received in evidence without objection as Plaintics' Exhibit 41.)

I have the figures of the expenditures made by me on this work prior to the time it was taken away from me. I got the figures out of the books this morning. This statement was prepared from my original books. Exclusive of the cost of any equipment such as machinery, I have paid out for material, labor and supplies $39,700.74. That includes labor, supplies, equipment and material. Not any overhead expense. A fair and reasonable monthly rental for all of my equipment would be at least $600.00 a month. Ten per cent would be a very low profit to be allowed on the work. I think the Phoenix-Tempe Stone Company used my equipment after they took the work over about four months.

The north abutment was completed October 26th ready for the fill. The south abutment was ready for the fill on November 2d. The number of men on the work would vary from 20 to 47. Between Christmas and New Year's there were very few men. The most of the men asked if they could go home for Christmas. It is ordinarily customary in construction camps to knock off work during Christmas week. I nearly always stop the work for [247] one week. Some of the men like to stay on the

(Testimony of L. DeWaard.)

work that have no homes and I let them stay in camp and let them work.

(Another photoraph showing the bridge and type of construction was received in evidence without objection as Plaintiffs' Exhibit 42.)

At the time the work was taken over half of the false work for this bridge was up. That photo was taken long before it was finished. At the time when they took the work over there were four cylinders waiting. Half of it had not been poured yet.

I am not sure that when I stated yesterday about the size of the hose whether I said "pump" or "hose." There was a 5-inch hose to a 4-inch pump and a 4-inch hose to a 3-inch pump. Those pumps did not do the work when you had to go deeper.

The total of all the moneys that I have received from the Phoenix-Tempe Stone Company at the time the work was taken over was $16,528.15.

(Thereupon telegram from Lester Wells to DeWaard and Sons dated February 3d, telegram from DeWaard and Sons to L. Wells, dated February 4th, were received in evidence without objection as Plaintiffs' Exhibits 43 and 44.)

I have examined the records to determine how many months the Phoenix-Tempe Stone Company used our equipment before they returned it and I find that it is five months.

Cross-examination.

I have had 40 years' experience in the business of bridge building. 16 in California and Arizona.

(Testimony of L. DeWaard.)

Mr. Cobham did not act as my representative when he approached the Phoenix-Tempe Stone Company with reference to this subcontract. He did not undertake the negotiations for me. He did wire me to come over and look into this contract. I did so and investigated the work to be done; went out there and saw [248] this bridge site, obtained the plans and specifications that were prepared by the State and I went over them. Mr. Cobham introduced me to Mr. Conway and Conway asked me to take the contract and I fixed my own price. When I examined the plans and specifications before I made that offer, I read the specification with reference to the cylinders in the bridge which reads, "The cylinders shall be sunk to bedrock. Loose and soft rock shall be removed from the surface of the bedrock allowing the cylinders to rest firmly on the solid surface." This is a customary specification for the building of a bridge. You can build a bridge without going down to bedrock. You can drive piles. You have to go to bedrock or drive piles or build on substantial clay. There was no clay ground in this vicinity that I noticed. I knew as an experienced bridge builder when I undertook this contract from the plans of this bridge that those piers would have to go down to bedrock or on piles. The driving of piles was not provided for. I also read the specification reading, "The basis of payment for cylinders shall be the unit price per lineal foot of cylinder named in the proposed schedule for cylinder complete in place,

(Testimony of L. DeWaard.)

including the placing of concrete and anchors and the furnishing of all material except cement and re-enforcements steel, labor, tools, equipment, and work incidental thereto." I did not base my price upon that specification. I had read that specification and knew it must be carried out, but there is another clause in the specifications which is that the plans govern.

The great body of those specifications are standard specifications that apply to all jobs. The special provisions to which you refer are not always made with reference to particular conditions on the bedrock. The general specifications here were printed. I expect the special provisions were inserted in typewriting. Including these two that have been read [249] to me about the cylinders going to bedrock and the basis of payment for the cylinders, was in typewriting attached to the specification. It is not true that the special typewritten provisions prevail over the one that has been read about the plans. The plans cover always in bridge building. The bridge cannot be built without plans. The bottom line on this plan represents bedrock. I say that complete the plans shows the elevation of the bedrock. It shows that the cylinder is sunk 6 inches in that bedrock. It shows there in several different places. The specifications say the plans govern. The statement in the specifications that plans are not prepared with intention of scaling the dimensions therefrom, "Figures shown on plans should be used throughout," means that when the

(Testimony of L. DeWaard.)

figures shows on the plans then you use the figures in preference of scaling.

It is not a fact that a solid line drawn on a plan like this means a fixed location and a line which is broken means assumed or supposed location. The fact that that line is broken means nothing except that it is below the ground, the same as this line from the piers. It is my understanding that this bottom line indicates a fixed location just the same as the solid line.

There are three test pits on that page of the plans and 14 piers. None of these three test pits are upon the exact location of any pier but very close to it. I don't know that there is anything on the plans anywhere to indicate that anybody had dug down anywhere except at these three test pits.

The test pit is to find out where the rock is, to find out where the solid foundation is. It is a sounding to find out at what depth the foundation has to be when they build a bridge or heavy construction. Some engineers take a pipe and make a bore and take the core of the rock out. Some engineers drive a little [250] stick in it and try to find out how deep they can drive the bar and others take a little auger and try to go down there and try to find this, but all of them in bridge building especially have an approximate or an established line. An established line where that bridge is going to be built on.

It is impossible for any contractor to make an

(Testimony of L. DeWaard.)

estimate on any bridge where the rock foundation is not given. No contractor can make an estimate of a bridge where the engineers did not indicate on the plans where the solid foundation is. If the contractor should bid on the bridge where that rock is not given, he may have to go 50 or 100 feet before he finds the rock and he could not make an estimate for anything when there wasn't any plan and there was nothing given. He could not make a bid on it within $50,000.00. I knew when I saw these plans that only three test pits had been dug or were claimed to have been dug and I knew that they were supposed to indicate the bedrock at the points where they were. I expected just what the specifications called for. Like they show on the plans up and down. Like the top of the piers are here.

I did not expect that the engineer when he made these plans had scraped off the sand and loose material all the way over the floor of this bridge to ascertain where the bedrock was. I did not expect that the engineer would know the exact bedrock upon any of these points where this line is. I expect it *to like* it is here on the plans. It gives the elevation properly and shows the line. I expected that if we had to go any deeper that we would be paid extra. We always expect that. I did not know that the bedrock would not be at the point where this line is. I knew that line was a presumed elevation of bedrock. I took it for granted. I didn't know that bedrock would not

(Testimony of L. DeWaard.)

be upon that exact level. I have found it sometimes hardly a foot difference in the whole bridge. Once in California State it [251] was indicated on the plans 4 feet below the surface and we had to go 25 feet. The California State Highway spent $85,000.00 extra on that. Some years ago when we built a bridge in San Diego County the line was given on the plan and when we got down there just the same situation as here and they had to drive piles and it cost $18,000.00. I knew that the bedrock might be lower and might be higher than these test pits here show.

The statement in Plaintiffs' Exhibit 13 that "our equipment, while sufficient for sinking cylinders to the depth shown on the plans and even 2 or 3 feet deeper, is not capable of sinking them deeper than about 3 feet below the elevation shown on the plans" is correct. That refers to additional equipment we moved in that time. The lowest elevation shown by any test pit is 4018. Three feet deeper would be 4015. I would have to look at the blue-prints to see if I sank any pier more than elevation 4,015. We sunk cylinders 4 feet deeper than as shown on the plans.

When you build 14 cylinders at 14 different places, you may strike a cylinder here that is practical driving. You may strike a cylinder there that has an abundance of water. You may strike an underground stream. You may strike a cylinder there that is practical driving and the next cylinder, perhaps 10 feet away, we have an

(Testimony of L. DeWaard.)

abundance of water. Now that happened in this bridge here. You will find that the one pier is quite different from the other. That is the reason that we did try our darned best to sink all of those piers to bedrock. It happened that the last four piers did have an abundance of water. That when we went four feet deeper as shown on the plans we were not able to handle that water. We tried and tried again to go even deeper. Pier No. 4 was sunk 3 feet below the first elevation. When the cylinder was sunk the surveyer and engineer had the elevation from a certain bench mark at the place it was taken [252] from. After that pier was down Mr. Grant did come down to the works and dig up the first pier and it was found out that the elevation that was given was about 2 feet and a half higher than is shown on the plans as per our statement. If that elevation was changed on purpose, I do not discuss that. I was not on the job when this change was made. This change explains the statement in my letter of October 27th to Mr. Lane when I stated that pier No. 4 went about 3 feet below the elevation shown by the test pit. I know that this change in the elevation was made on the reports that the superintendent made to me daily. I knew that the change had been made when I testified here this morning. I can't say that pier No. 4 went down below the elevation of 4,018. Yes, 4,018 is indicated here as the elevation at the bottom of this test pit. That is the first elevation. If that ele-

(Testimony of L. DeWaard.)

vation is 2 feet lower, the whole rock line should be deeper in the water. I have no means of determining whether or not that elevation the engineer fixed on the ground is correct or incorrect.

This model diagram on the plan, just above the word "plan" here, is a cross-section of the bridge at the top of the bridge as if you were looking from the top down to it. And it shows the width and length of the bridge. This lower diagram here above the word "downstream elevation" is a profile up and down of the bridge. That profile is not on the center line of the bridge here. The "C" on the left-hand side of this map above this "Fn" means center profile of the ground. There are three profiles. One on the center and two on the outside from the line. It is not a fact that this thing here is a profile of the bridge and on the same center line all the way up and all the way down and that the top line over there on the top of the bridge is the center line of the bridge and the bottom down below there is the bottom in the middle of the bridge. This [253] bottom line here representing underneath of the pier, I don't know on which side of the bridge it is. At every place where there was a pier on one side of the bridge, there was also a corresponding pier on the other side. There is no test pit sunk for a particular pier. The test pits are sunk to establish a solid foundation for a bridge, but not for one particular pier. I figured that the piers on the one side of the bridge would go by the rock eleva-

(Testimony of L. DeWaard.)

tion as given in the plans, "Test pit station 396, sand and gravel to rock elevation at 4023." This particular pier now shows clearly the rock not only by scaling but by elevation. This pier was the pier that we had the most trouble with. I am not sure but the record will show that this pier went 4 or 5 or perhaps 8 or 10 feet deeper. I am not sure about this. This is one of the unfinished cylinders where the rock was not where we put the cylinder down 3 or 4 feet below that rock and then we did not have the rock. We had trouble to get the water out even below that elevation. We went down on the other side of the bridge at the same point for the other pier and we did not find the rock. For this pier on the other side we went by the general rock elevation.

If the contractor did not have that general rock elevation and the plan, it was impossible for him to make a figure how deep that cylinder should go. You won't find any contractor in the world that will make a bid on any bridge that does not show the depth on the foundation. I don't know if I bid on the Queen Creek Bridge on the road between Mesa and Superior where the plans did not show any rock foundation at all. If I did, I investigated where the foundation was. I don't remember whether I made that bid. Am not sure but I don't think so.

I bid a unit price for ten-foot cylinders. I knew it was in the contract "It is expressly understood and agreed that the quantity of work to

(Testimony of L. DeWaard.)

be done hereunder as shown on the plans and [254] specifications of said State Engineer and as shown herein are subject to change and modification by the State Engineer, and the party of the second part shall do and perform all of said work and improvement as may be required by the State Engineer at the prices hereinbefore quoted." I figured on that, but that has attention to sinking the piers deeper and it was in the contract "That the party of the second part shall be paid for said work only according to the estimate of said State Engineer" and I agreed to that.

The four piers at the north end of the bridge are the ones we call 1, 2, 3 and 4. The next two piers next from the north end of the bridge are numbered 5 and 6. The four at the south end of the bridge are numbered 11, 12, 13 and 14. We put all those in. We did finish 12. We finished 12 after the letter that we wrote to Mr. Lane on October 27th. We did not finish any more after that. We tried to go deeper with them. We kept on working on these other piers. That is, 7, 8, 9 and 10. We put them in but we could not finish them. We went maybe 3 to 4 feet, perhaps 5 feet, below the rock elevation. It was more difficult to go down to elevation 4,015 here in the middle than it was to go to the same elevation here on this side. We struck the running river on the bottom—water. The ground water elevation was the same in the middle as on the side. No, we did not dig down at the test pit to show the

(Testimony of L. DeWaard.)

rock. We did dig down at the test pit here at this elevation 4,020. On one side on our pier excavation we struck rock at the exact elevation and on the other side, as stated in my letter, we had to go 3 feet deeper. The test pit excavation on the side of the pier next to it on one side was absolutely right. The pier was 4 feet in diameter but in that area of 4 feet it dropped down 3 feet because loose rock was down there. That is a common thing in excavation, loose rock laying on it and you have to go deeper [255] to the solid rock. We knew that that was apt to happen before we ever started to dig on top of the ground. I don't know whether there was solid rock on the other side or not. I think that is the closest where we ever came to the point where the test pits had been dug. The same thing happened on the other side of the bridge at this same location with cylinder No. 14.

I think it was on the 13th of September that I first made a complaint to the Phoenix-Tempe Stone Company that I wanted to be paid for extra work on account of this excavation—1st of September. On the 4th of September I think it was. On October 4th was a writing but I was in the office of the Phoenix-Tempe Stone Company a month before that. I sent a written claim before October 4th.

The first day that I made a claim of any kind on account of extra work was the day Mr. Hoffman and the engineer, Lane, of the Federal Aid,

(Testimony of L. DeWaard.)

was out at the bridge. I don't remember just now when it was, but it was in the correspondence. That was a verbal claim. I am not sure Mr. Grant was there but I am sure Mr. Hoffman and Mr. Lane were there. The first claim was made to the Phoenix-Tempe Stone Company directly when we had to go deeper by telegram. I think it was produced under September 9th. I began work on the piers on August 12th. These three piers completed in August were so slightly below the excavation that the claim for extra was not put in.

The first three piers that I put in was the three northern piers, Nos. 1, 2 and 4. On the 27th of October when I wrote the letter to Mr. Lane, I believe I had sunk pier No. 1 one foot and eleven inches below the elevation shown on the plans, pier No. 2 to the exact depth shown on the plans, and cylinder No. 3 to 7¼ inches below the depth shown on the plans. And I received an estimate showing the basis of payment therefor according to the contract and not as extra work, but I am sure [256] I was putting in a bill on the 1st day of September with the Tempe Stone Company for extra work. I wish to be understood that our claim for extra work on piers 1 and 3 was early in September. The Tempe Stone Company never did send me a copy of the engineer's estimate. I don't know that my claim for extra work on cylinders No. 11 and 12 in September is a complete statement of all of the extra work that

(Testimony of L. DeWaard.)

I claimed at that time. I think I have another claim in there.

They worked on the piers all the time up to January. We did very little work after October 20th when it was very hard and we could not get it down, all the piers, except to bedrock, and the other four were down to about 4 feet below the rock elevation. I cannot say that all those piers were finished before October 20th.

We never got a copy of your estimate. We got the money but not the amount we have down here. On the October estimate nine cylinders appeared to be finished, and another one was finished in November, making ten. That is all we finished.

Question. So after the first part of November you didn't do a tap on these cylinders. Is that true?

Answer. No, sir. We had four cylinders, 4, 5, 6—just where the one is—these four cylinders down here, 1, 2, 3 and 4, we worked on that all the time, and I can't give you the dates on that, and we could not get them down to the rock. We could not find the rock.

Question. Well, but on the 27th of October those same cylinders were already sunk to 4 feet below the bedrock shown on the plans, weren't they? (Handing document to witness.)

Answer. Yes, sir.

Question. And that is as far as you sunk them, isn't it?

Answer. Oh, no, we kept on trying.

(Testimony of L. DeWaard.)

Question. How far down did you go with them? [257]

Answer. I don't remember that but I can tell you how much we worked.

Question. Did you go down 10 feet?

Answer. No, I don't think so.

Question. Mr. DeWaard, with the equipment that you had there, how long would it have taken you to put in those four cylinders?

Answer. Our equipment—we needed additional equipment to go deeper. We could not go deeper.

Question. Why couldn't you get the additional equipment?

Answer. For the reason that we did not get pay for it.

Question. Was there any difference between trying to put them in properly or trying to put them in with equipment that would not put them in?

Answer. Besides that, Mr. Conway told me that we would not get one damn penny for it and I did not care to spend a couple of thousand dollars for equipment for it and not get a penny for it.

Question. Do you expect to be paid now for fooling around there from the 20th of October until the 1st of January accomplishing nothing with equipment that was not adequate for the work?

Answer. We did put up the false work and we put in the piers and we put in the abutments and we did so far as we could go.

(Testimony of L. DeWaard.)

I don't know that the piers were afterwards put in with a 6-inch pump without any trouble whatever. The biggest pump we had there was a 4-inch—a 4, 3 and 2. All together they are not equal to a 6-inch pump.

I agreed with the specification that provides that "work that can be reasonably classified and paid for at the unit prices provided in this contract shall not be regarded as extra work." [258] The extra work began directly when the holes were below the elevation shown by the test pits. Say 4 inches as a limit. I am sure I made a claim for extra work for every one of the cylinders. I know the claim for 1, 2, 3 and 4 was the first. I made claim from the first day we started in with extra work.

Referring to Plaintiffs' Exhibit No. 9 which is a list of equipment, total $3,741.90, was second-hand equipment we shipped from our yard in San Diego. The valuation on this list was the inventory valuation and it includes everything. I shipped some more which is on the additional list that I put in this morning. Some equipment on this additional list was shipped from Big Bear Lake, some of it from San Diego. I have several lists here of small items. I bought two Ford trucks from Ed Rudolph amounting to $800.00 each. I paid part for them. And on October 1st I bought a 2½-ton truck from San Diego. On October 22d I got a new mixer from Legg and Taylor of Phoenix. That was not left on the work when the Phoenix-Tempe Stone

(Testimony of L. DeWaard.)

Company took charge of it. I did ship it to California. I had it on the work from the 8th of October to January. I had an Oxford mixer on the job that the state condemned. The 2½-ton truck did not remain on the work after the hauling was done. I don't remember exactly when it left the job.

I did put some additional equipment on the job for the purpose of handling this water but we struck more water. The additional equipment was not enough. The Pierce-Arrow truck remained on the job until all of the hauling was finished. Don't remember the date I took it away. The Oshkosh mixer was practically new. It did not remain on the job after I left. The American centrifugal pump with 6 H. P. engine was not taken from the job. It is still there as is also the gas-engine purchased from Haselfeld. All the equipment that is there still is not worth five cents to-day. You wore it out and destroyed it. [259]

There was about 10% of this work left to do on this job when I left it. I was not on the job just before Christmas. I was there in September. I would have to look up the records and see just what time.

Sure there was work done on the piers between the 4th of November and the 20th of December. I don't remember receiving a letter or telegram from Mr. Van Doorn about November 20th asking me to come over here and confer with Mr. Lane with

(Testimony of L. DeWaard.)

reference to how I was to be paid on this bridge work.

We didn't finish the work because the Phoenix-Tempe Stone Company run us off and collected the money themselves. We left a man in charge there by the name of Mr. Welch and Mr. Goldmer. We are informed that Mr. Van Doorn came down there and went amongst all the men and told the men they would not get any money more and that they could work for the Phoenix-Tempe Stone Company. The men that worked for us they went to work for him. You persuaded them to stop with us and work for you people. Mr. Bunker was gone Christmas-time and the men was not there. You people did come on the job just to stir up something. We left a man to watch the job. No, sir, it is not a fact that we took our men off from the work and shipped our equipment to California about the first of the year. We did not take the men off. We put men on. We hired men. We did not take any men off the work. We just came on holiday for Christmas. I don't know exactly what date I called Mr. Bunker, the foreman, off the job. I think it was a couple of weeks prior to the time the Phoenix-Tempe Stone Company took charge of the work. The Phoenix-Tempe Stone Company wrote me several letters. I left the man in charge to straighten out the affairs with the Tempe Stone Company.

Question. Well, now, I want to know from you, Mr. DeWaard, what day did you quit on that work up there? [260]

(Testimony of L. DeWaard.)

Answer. We did not quit, sir. We never did quit. December 29th the Phoenix-Tempe Stone Company ordered the work stopped.

Question. Well, now, then you state that you stopped then before the 1st of January.

Answer. I don't say we stopped, sir. You stopped. The work—was the telegram clear? We did not stop. You stopped them. Van Doorn went around there and stopped it. I was not there. Mr. Welch, the man I left in charge, would have been there to-day if you had not taken him away.

(Thereupon pay-roll of December 11, 14, 16 and December 25th, showing that on the 25th day of December there were 34 men at work, was received in evidence without objection as Plaintiffs' Exhibit 47.)

I know nothing about stopping work on December 29th except what that telegram says. I had a report later on. I knew that the provision was in our contract that "if at any time there should be evidence of unpaid bills for which the party of the first part might be held liable, the party of the first part might withhold payment of sufficient money due to party of the second part to cover such material and labor bills or other liability." I don't think there was $8,000.00 of bills that I owed on this work outstanding on December 20th when this November estimate became due. There was a considerable amount. There were no unpaid labor checks among them. There were a number of unpaid labor checks. They were all written December 21st.

(Testimony of L. DeWaard.)

There were $1,700.00 worth of labor checks that the Phoenix-Tempe Stone Company paid. I gave orders to the Tempe Stone Company to pay the bills. There was about eight thousand in bills against Project 72–A. These bills are not all my bills. A good many of these bills are for work done for the Tempe Stone Company and the Tempe Stone Company never did pay any. I admit [261] that all of these bills put in down there are against Project 72–A, but still I don't say they are all my bills.

The Phoenix-Tempe Stone Company never loaned me $2,000.00 to pay bills in this work. What happened was I went to the Phoenix bank and gave them my note for $2,000.00 and the Tempe Stone Company guaranteed that they could take that $2,000.00 out of monthly payments. I don't think they signed the note. I did not get the $2,000.00 from the bank on the guarantee of the Tempe Stone Company. I gave an order to deduct it. I had that money some 15 days before my estimate became due.

I presume there was between seven and eight thousand dollars worth of equipment left on the job when I left it in January, 1925. The Tempe Stone Company destroyed it and it disappeared from the job. I don't know what part of it they used but I have seen what they left and they smashed it up. The first time I saw it after they took possession of it was last week, but I had some reports of it. They used the crusher. I don't

(Testimony of L. DeWaard.)

think they used the mixers. I think they used the pumps. They took possession.

I don't think it would have cost $4,000.00 additional to have finished those four cylinders. That all depends on the footing.

I said I could have finished that bridge, filling of the concrete and laying the pier, for $400.00. I didn't say that that included the sinking of the piers to bedrock because I don't know where the bedrock is. I don't know how much money the Phoenix-Tempe Stone Company spent to go deeper. I don't know that the bridge was actually finished by putting those piers down to actual bedrock. The $1,500.00 estimate I made for finishing the bridge assumed that the piers were left where we left them—not to go any deeper. I based my estimate on the plans. I could not make any price on putting the cylinders [262] down to bedrock.

When I had the talk with Mr. Conway he said, "You don't get a damn penny out of it until you finish your work and now go to work and shut up."

It is not a fact that he offered to give me the 15% they were getting from the state. I do not remember that. I will not state that they did not. I do not remember.

My men completed the wing walls on the north end of the bridge and the false work for steel and the water run under the false work under the wing walls. It is not a fact that I had my cement house and a lot of my equipment in the exact place where this fill would be made. My cement house

(Testimony of L. DeWaard.)

was just on top of the grade where the road was. The cement house would not have interfered with making that fill at all. The cement house was about a hundred feet away from the fill, I guess.

No, sir, these arrangements that I made with the subcontractors in Peoples Valley were not made because I fell so far behind in my work that they agreed to do the work themselves and I agreed to pay them for it so that they would not be interfered with in their work. We worked in harmony with the fellows down there. They have their unpaid bill in this case. I gave them an order to receive that money from the Tempe Stone Company. I don't know that the other subcontractors were ahead of us in the percentage of work completed. I did not say they were slow. I said they were in our way. There was no trouble between us and the subcontractors. They did delay us with the back fill of the bridge and on the grading and the guard-rails. The grading was not finished to put in the guard-rails. Some portions they were blasting and we could not work at the same time. That don't say they were slow. They may have done the best they could. There wasn't a good road over which we could haul our stuff for our culverts. In some [263] parts there was no road at all. There was an old road in Peoples Valley in some places. I used some of it. When the new road was built they made spurs in the road and we could not travel the new road.

(Testimony of L. DeWaard.)

(Thereupon Defendants' Exhibits "A," "B" and "C" were received without objection, Exhibit "A" consisting of two checks written by DeWaard and Sons to different persons with a slip of the bank showing nonpayment thereto attached, Exhibit "B" being the same except consisting of two checks only, and Exhibit "C" being the same except consisting of eight checks.)

I still say that I put sufficient money in the bank after my account was attached on or about December 20th to take care of all checks that were outstanding. These checks received in evidence (Defendants' Exhibits "A," "B" and "C") were given out prior to December 20th when there were funds in the bank. At the time when they were presented the money was attached. After the attachment was released about December 23d, we expected the Tempe Stone Company would put in that $4,600.00. We did not put enough money in the bank to pay these checks. We expected the Tempe Stone Company to put in the money like they agreed to. They had agreed to do it before and they did not give notice that they had not done it. I think the bank sent the telegram.

Refreshing my memory by looking at Exhibit No. 37, I will say I did receive a telegram from the Phoenix-Tempe Stone Company on the 23d.

Yes, I did work up there after the Phoenix-Tempe Stone Company stopped the work on the 29th of December. They took the men away but I had men at work on there in January. They or-

(Testimony of L. DeWaard.)

dered the work stopped on December 29th but did not stop it.

Referring to the time-sheets up to January 8th on this job, I cannot tell whether they represented all the men I had at work. Mr. Bunker can tell that. I have no further time-sheets after [264] January 8th. Van Doorn was there on December 29th and about December 20th, too. I have reports from my superintendent. I was not there.

(Thereupon two time-sheets were received in evidence without objection, attached together, as Defendants' Exhibit "D.")

I do not claim I had any more men than are shown on this sheet that worked during that period. We did not stop work at all. Mr. Van Doorn went among the men and induced them to stop. No, sir, it is not a fact that on the 16th day of January, 1925, I ordered Mr. Bunker to lay off all the men without paying them. We gave orders to get men if the men would work and wait for their money and we would feed them at the camp until we would get money from the Tempe Stone Company. On that date the Phoenix-Tempe Stone Company was nearly three months behind with our estimate. I think your estimate for October was paid us on November 20th. I think some of your estimates are incorrect. The estimate for October was paid in November at the proper time. The estimate for November which became payable on the 20th of December was not paid or put in the bank. I figured it amounted to eight thousand

(Testimony of L. DeWaard.)

but you say $4,600.00. The next estimate for December was not yet due, on January 16th. All of the money that the Phoenix-Tempe Stone *Company, or* had become due to me at that time, was the one estimate for November. That small amount of money did not make it impossible for me to pay my bills but Mr. Conway said they would not pay a damn peny and that is the reason we had better let you pay it.

When I started this work I had an understanding with the Tempe Stone Company that they would deposit the amount of the estimate in the bank on or before the 20th of each month. I started this work in June. The first estimate was sent to San Diego and all the estimates were deposited in the bank up until the November estimate which was to be paid in December. The [265] Tempe Stone Company told us that $4,600.00 was due on the November estimate. We did not dispute the estimate at all. We wanted them to put this in the bank as agreed on and that was sufficient to take care of the matters. On December 20th there were eight thousand bills outstanding justly owing for which I am responsible but which were not owed by me.

(Thereupon copy of telegram dated January 16, 1925, from DeWaard and Sons to W. E. Bunker was received in evidence as defendants' Exhibit "E.")

In pursuance to that telegram Mr. Bunker did let all the men go and the Phoenix-Tempe Stone

(Testimony of L. DeWaard.)

Company paid the bill. We had paid $36,000.00 and was many dollars in the hole and you had the money.

(Thereupon a letter signed "DeWaard and Sons per Lester Wells," dated February 3, 1925, was received in evidence without objection as Defendants' Exhibit "F.")

It looks from that letter as if I was in possession of this work until the 3d day of February, 1925, and it looks as if for two weeks prior to that time Mr. Wells was my sole man on the job.

I am informed by the Treasurer of Arizona that the Tempe Stone Company has been paid in full and that the amount of this contract is $42,000.00. Those seven cattle-guards built instead of which as provided in the contract is close to another $7,000. I am sure they had considerable excavation what has not been paid. I am sure there is additional concrete put in the work that should be added to the concrete. I consider that concrete with the extras and the money spent on sinking the piers deeper than provided for in the plans and specifications amount to more than $52,000.00. The Tempe Stone Company has paid us $16,000.00. The balance of that amount must have been paid to the Tempe Stone Company. At least the lowest sum that has been paid must [266] be $42,000.00. If the contract could have been finished according to the plans, we could have had that contract finished long before December. You held us up for three solid months. That has cost us at least

(Testimony of L. DeWaard.)

five thousand or six thousand dollars just for holding up and that is an answer to your question that I would have the right to say that money was received by the Tempe Stone Company and not paid to us.

Redirect Examination.

(Thereupon letter from DeWaard to Mr. Bunker dated September 14, 1924, was received in evidence without objection as Plaintiffs' Exhibit 48.)

(Thereupon telegram dated September 14, 1924, was received in evidence as Plaintiffs' Exhibit 49.)

(Thereupon the allowance estimate of the Phoenix-Tempe Stone Company dated December 1, 1924, for $4,460.93, was received in evidence without objection as Plaintiffs' Exhibit 50.)

(Thereupon typewritten list of additional equipment was received in evidence without objection as Plaintiffs' Exhibit 51.)

There are two more shipments that are not shown on that list.

These cylinders as shown on the plans all stick up above the ground water elevation. When we came to sink those cylinders the water poured in from the top as well as came up from the bottom. Some of them were 4 or 5 feet below water when we were through with them. If the water elevation had been as shown on the plans and the cylinders according to the plan, water would not have poured in at the tops. According to the plan, all of the cylinders are on top of the water elevation shown here, the highest 6 feet above water and the

(Testimony of L. DeWaard.)

lowest about 1 foot above water. The highest cylinder is the center of the creek. The cylinder for which I was unable to find bedrock at all and gave me the most trouble was the one right in the center and the rock [267] shown under it on these plans.

I made a mistake yesterday when I said there were only seven uncompleted culverts on the job. I looked over the records last night and I did make a miscalculation, but the amount of concrete and the amount of labor and the amount of material is exactly the same as the total that was unfinished. There were eleven unfinished culverts—small ones —but the amount of concrete was exactly as I gave it.

I testified yesterday that when I quit the job there was between 80 and 85% completed. I determined that fact by figuring out what was the work that was unfinished and what it would have cost to have finished the work. Eighty per cent would be very low. Eighty-five per cent, I think, is the correct amount. That is taking into consideration also the primary work done in connection with the contract. The pier that was mentioned yesterday that was hanging on one side of the rock—and the State Highway Engineer did call for the engineer to come down. It took them four days to come down. Besides that, the wing wall is 4 feet above the ground. There was no fill made by the Tempe Stone Company. Then we put a wing wall on top of the false work so as not to delay the

(Testimony of L. DeWaard.)

work. We suggested that the wing wall should be built to the solid ground and put a concrete pier under it to hold it up and Mr. McLain, the Federal Aid Engineer, suggested that Mr. Hoffman as the State Highway Engineer would let us know later on what had to be done. It was decided to let the wing wall stand on the temporary false work and the temporary false work is to-day on that wing wall. We were held up there. At the last rain the dirt ran from the roadway. We told the engineer on the work at the time and it took them four days to get out.

We did not receive pay for the two cattle-guards that were outside of the contract entirely. They were on county roads not in the Federal Aid Project. The Tempe Stone Company paid [268] me the price for them as extra work. And then there was five constructed in place of the three, besides those two on the county road. So far as I know they did not receive any money for that and we hauled the material out for ten cattle-guards.

During that four days delay when we were held up for the inspection by the State Engineer, a big flood came in the night a kind of cloudburst, and washed this whole thing out and that delay cost us several hundred dollars.

Recross-examination.

I said there were eleven of those culverts to do. There was another one—a little bridge, but the amount of concrete is exactly the same as I gave

(Testimony of L. DeWaard.)

you yesterday. There was one contract for the whole business—not a Peoples Valley contract and a bridge contract.

TESTIMONY OF RAN BONE FOR PLAINTIFF.

My name is Ran Bone. I reside at Globe. My profession is engineer. 16 years experience in the State of Arizona, Nevada and Old Mexico. Six on railroad construction and highway construction. On bridges from 110 feet spans down to culverts. I am familiar with the interpretation and reading of plans and blue-prints.

Referring to that drawing there on the blackboard (Plaintiffs' Exhibit 3), that line on the bottom indicates to me the supposed bedrock. As tested by those test pits I would say that line indicated bedrock. I mean the dotted line. Customarily, on blue-prints when you have a straight line here and you know the cylinder goes on back so you can't see it, it would be put in on dotted lines on your blue-print. It is under the sand and gravel and can't be seen. In other words, that line below the line which is shown as the ground level line is dotted on that blue-print. That is customary on blue-prints [269] and is indicated on this broken line. It would ordinarily be presumed that the line was put there for the purpose of indicating to the contractor where he could expect to find bedrock. The contractor would have to have something to indicate bedrock there to

(Testimony of Ran Bone.)

figure the estimated cost of the bridge in asking for bids. If there were no bedrock given at all there, it would be up to the contractor to go there and make a drilling and find out where it was before he put in his bid. It would not be possible with those plans and specifications, assuming that there was no bedrock given, to make an intelligent and fair bid without doing his own testing.

There are three test pits there showing what has been done there. The elevation of this rock, is 4,018. The elevation of the water is 4,026 and the cylinders 10 feet. That would be 2 feet above the water line for the top of the cylinders. Those cylinders in the center marked "A" would stand above water level 3 feet and this one 4 feet above. To extend that work down below the bedrock as indicated on the plans to get the cylinder down to bedrock would be more expensive work.

Cross-examination.

I am registered engineer of the State of Arizona.

Yes, there are two methods of preparing plans for bridges, one of which shows exact elevation to which the piers will be sunk and the other does not show the elevation to which the piers would be sunk. I would say that this plan here does show the elevation approximately to which all of the piers will be sunk. The test pits are the only places where the elevations are indicated. That symbol under the test pit is rock or bedrock or hardpan. We use that symbol for any kind of rock. I would think that the engineer making

(Testimony of Ran Bone.)

this plan, by his test pit here and test pit here and test pit here, would indicate that he had knowledge that the bedrock was there. It is [270] true that bedrock is rarely as level as a floor. This test pit is indicated right here on the center line. I would not say as an engineer without looking over the site that I would expect to find a variation some place on this bedrock. If I did look over the site I could probably tell whether there would be variations or not. I would not say that any experienced construction man could tell that as well as an engineer. It is because of actual experience that I have had from digging in the ground that I can tell this about bedrock.

The figure 4,018 on the plan means above sea level. I didn't say that it was a different class of construction or more expensive work to dig to the same depth of 4,018 at this middle test pit than it would be at the test pit I mentioned. I have had experience where one end of the abutment would go several feet deeper than would the other, and the deeper hole cost more money than the shallow hole. The fact that you go a few feet deeper always makes it more expensive under water but not out of water. I would say there would not be any particular difference between going down to the elevation 4,018 at this point than at this point (indicating). Yes, there would be an unfair proposition in the bidder receiving a unit price for the feet that he actually sunk because it cost him more money. He bid from this line up. If he had to go below

(Testimony of Ran Bone.)

that line, that is extra work added to the cost of the bridge. The engineer in figuring his estimate and asking for bids on this bridge has considered this as bedrock and has figured the cost of the bid to that. I have no knowledge of what was done in the case of these plans.

Redirect Examination.

My method has always been on building bridges on such plans as this to pay for such work on cost plus. [271]

Recross-examination.

The State Highway Department while I was working for the state drew their plans very similar to this. Each draftsman has a little different way of working. I did not pay for somebody going down below the depth shown by that bottom line there as extra work while I was with the State Highway Department. I was on the construction work for the State Highway Department at the time but I received pay for the extra work with the Inspiration Copper Company and I allowed pay on the Fossil Creek Bridge on very similar to this proposition. When I was in charge of the camp for the state we were working on a day labor job. There was some extra work allowed on the Queen Creek Bridge while I was working for the state. I can't recall whether that was the question of bedrock. That was some years ago.

Redirect Examination.

The State Highway Department estimates the

(Testimony of Ran Bone.)

cost from these plans taking the bottom of the test pits there.

Recross-examination.

While I was with the State Highway Department there was always the provision in the specification that the estimate was approximate only and also the provision that the engineer might change or decrease the quantities, and he very often did.

TESTIMONY OF F. N. HOLMQUIST, FOR PLAINTIFF.

My name is F. N. Holmquist. Reside in Phoenix. Profession civil engineer since 1909. My experience has covered different kinds of engineering, municipal work, road building, and general looking after plans and specifications. I know how to read plans.

(Referring to Plaintiffs' Exhibit 3.) I would take this lower line to be bedrock. I have examined the next sheet of [272] the plans and parts of the specifications. On the next page is the detail of abutment section or center line. There is a line at the bottom having the same legend as on the front page, indicating the same line as I have indicated as being bedrock on the other page. There is an indication showing these cylinders resting on this line and extending down into, with the lettering here "anchor rods each cylinder 4 feet long at least 18 inches into bedrock," and in my view that is intended to be bedrock, and also the specifications provide that the cylinders must be sunk to

(Testimony of F. N. Holmquist.)

bedrock and these plans show that the cylinder extended down to and into this line, which has nothing to indicate where it was intended to be. The details of this same page indicate the same thing.

I would say that the contractor would undoubtedly interpret that line to mean bedrock, that is, not just to an inch, but very close to it. If it was necessary to sink the cylinders any considerable deeper, it would undoubtedly be more expensive work.

Question. Suppose that some of them were required to be sunk 3 or 4 feet, would that be a different class of work?

Answer. Well, it would begin to be different. It probably would not be so serious in 3 or 4 feet in this case but there would be a difference all right.

The COURT.—How is that?

Answer. I say ordinarily a contractor would not try and split hairs on that but if it run into much extra money, he would be justified in asking for extra pay for it.

Where cylinders rest on bedrock, as these plans indicate, they would have to get this cylinder empty of water. It would have to be dry so they could drill these holes and put these rods down and then put the concrete on top of the bedrock. You don't want to have a layer of sand or dirt or any material between [273] the bottom of your cylinder and the bedrock. If you do, it is a serious matter and might cause a settlement or ruination of the bridge.

I would interpret this plan to mean that wherever you see these hatching lines that is where the

(Testimony of F. N. Holmquist.)

really definite data was taken. A dotted line is used when a certain line is solid but when there is something to obstruct the view of it, so it shows it is in the background. It is used just to show that this and this and this are parts of the same surface. Those dotted lines indicate that there is something concealed from view of these piers. In this case it would indicate they wore down in the ground. That is the usual meaning of those lines used in that way. If it was in the water, I would say it was considerably more expensive to go a matter of some 3 to 4 to 5 feet deeper with the cylinders in the water.

Cross-examination.

I would not say that if I were an engineer preparing these plans and drew this line here that I would know that that would not indicate the exact location of bedrock. It depends on what you mean by exact. At the bottom of the test pits it shows rock only—not bedrock. It is not presumed that the engineer has scraped all of the ground off along the line to determine the exact location of the bedrock at the points between the test pits. He might have done that in some place, but he would not scrape it off. If he was going to do that, he might as well build the bridge. It would suggest that because he has indicated three test pits that that was the only points where he made any investigation, but the fact that he put this line in here would indicate that he had reasons to believe that the rock was

(Testimony of F. N. Holmquist.)

there, too. It would not necessarily indicate that he was guessing at that. A contractor might know that he would find it a little shallower or a little deeper between [274] the test pits, but not any considerable distance. If it is shown on the plans as this is, I would figure that it ought to be pretty close. It is possible for the bedrock to drop down 20 feet between there, but not likely. There are other things on this plan that would help bear out the assumption that this is pretty close to bedrock. For example, the length of the cylinders is given, and the position of them, which justifies the conclusion that bedrock is there. It is assumed to be there. It might be incorrect, but if it were incorrect, it would be a different job entirely.

I am familiar with the plans that the State Engineer has had for some time, and the specifications which say that the engineer may change the quantities. I think the intent of that is they are subject to revision rather than change. It would be changing the whole design of the bridge if the engineer found bedrock at some higher point between these places and moved the pier over to that point. I don't think he did that with the bridge at Flagstaff. The purpose of drafting plans for the construction of a bridge to be submitted to the contractor is so that he can make an intelligent bid on the work, to make it a legitimate bid instead of a flyer or gamble.

I would not say that the provision that the cylinders shall go to bedrock in the specifications is

(Testimony of F. N. Holmquist.)

usual. In some cases they are intended to go to bedrock and some they are not. If bedrock is within a reasonable distance, why naturally they put them to bedrock, but if bedrock is not within reasonable distance, why they try to get the cylinders below the midstream scour line and in the bottom of this drive piling. I presume the purpose of the specification saying that the cylinders must be sunk to bedrock is that they wanted to get it to bedrock at all events no matter where it might be. [275]

Redirect Examination.

When the state engineering department prepares a plan for a bridge, it makes an estimate as to what the bridge should cost or would cost, and in making that estimate the department will base that estimate on that line there indicating bedrock. There would be nothing else to go by.

Recross-examination.

When the work is done the estimate is sometimes varied quite a bit and that is justified under the provision that the estimate is said to be approximate only.

TESTIMONY OF RAN BONE, FOR PLAINTIFF (RECALLED).

Whether or not the excavation for the cylinders on the north end of that bridge to a certain depth below water level would be as expensive as the excavation for the cylinder in the center the

(Testimony of Ran Bone.)

same distance below water level, would depend on your local conditions there. If your banks were muddy with sediment, the water would not run in as fast. If the center of your stream should happen to be gravel or sand, it would be harder to excavate and more expensive to excavate. Referring to the plans, according to the ground water on the 17th of January, anything from 8 to 10 feet would be ample for the cylinders on that bridge. The plan itself states that the cylinders are to be 10 feet in length. I would provide a cylinder that is long enough to keep you out of the water when you reach bedrock. From those plans I would say an 8 to 10 foot cylinder is sufficient if the bedrock is where as indicated there.

TESTIMONY OF F. N. HOLMQUIST FOR PLAINTIFF (RECALLED).

If I were constructing that bridge from the plans, if the data shown on the plan is correct, I would not have any criticism [276] to make as to the length of cylinders that is shown. The length of cylinders is shown. The figures are given for each separate cylinder. The different cylinders are different lengths. No, they are the same. I had not examined it with that idea in mind. They are different elevation. The tops of them are higher and I just assumed that they were different but they are all the same. In other words, regardless of whether the bottom of the pier was to be an elevation of

(Testimony of F. N. Holmquist.)

4,018 or 4,023 or 4,020, the cylinder was to be a 10-foot cylinder anyway. Yes, sir, all of those 10-foot cylinders would come above the ground water-level as shown on the plan. [277]

TESTIMONY OF WALTER E. BUNKER, FOR PLAINTIFF.

My name is Walter E. Bunker. I reside at San Diego, California. My occupation is Civil Engineer. During the past 24 years have been engaged on various kinds of civil engineering. Quite a little of that has been construction work, such as railroads, highway, sea-wall construction and fortification work. I am now in charge of highway improvements, principally bridges, for Watson, Valley and Cough, as construction engineer of several projects in California.

I am familiar with the reading of plans and blueprints, and the interpretation thereof. From August to January, 1925, I was employed by L. DeWaard and Sons as Superintendent on the job in question here.

(Witness refers to Plaintiff's Exhibit 3.)

There is an indication of bedrock on this plan. Here is a test pit which shows rock at the Phoenix end. There is also a test pit about the center of the creek bed. There is another over at the other end of the bridge. Below that line is some hatching which, judging from another section of that plan, is bedrock. That hatching under the line is

(Testimony of Walter E. Bunker.)

identical with this on the other section which is designated as rock. There is the same hatching on that same sheet further up on another section of the same sheet, and that is designated as bedrock and is exactly the same as the hatching for the ones below. There is a line between these elevations shown on these test pits which is a dashed line joining the top of the elevation of that bedrock.

When I was working on the job I had a sheet of plans that was supposed to be blue-prints of the same tracing. I think that on piers which would be designated 5 and 6 we found bedrock at the points indicated on the plants, at the points indicated on this down stream elevation. That is, between two [278] of the hatchings, and not near any test pit shown on the plans, and that is about on the line which connects those two portions designated as rock. On Piers 5 and 6 I found bedrock about as indicated on that map. Those piers are not on those hatchings but on that line. The broken line indicates the location of something that exists or is to be built that cannot be seen or that is concealed from view. On that plan there is also indicated in broken lines part of the concrete wall extending from the top of the cylinder to the bridge seat elevation, which is below the ground line. Then all of the cylinders which show, as they all do, below the ground line are shown in broken line. On that map any line that is concealed from view is shown with a broken line with the exception of the test pit sites. The plan indicates that those

(Testimony of Walter E. Bunker.)

test pits are on that line. When we sank the cylinders 7 and 8, which are these that show directly on the hatchings on the plan, when we got down to the elevation shown as bedrock on these plans—all along we had encountered a very much greater volume of water than we had in some of the previous cylinders. The reason for that was that there was quite a different kind of formation. Even though some of the other cylinders are sunk to a lower elevation, the material into which they were sunk was not so porous and the water did not flow into them as rapidly as it did through these. With these cylinders 7 and 8 we had more difficulty in getting as low down as the elevation shown here on the plans for bedrock than in some of the others, because the flow of water was greater but we were able with one pump to put them down to the elevation here shown for the bottom, and then as we did not find bedrock I notified Mr. de Waard as I had before when we reached that elevation and asked for instructions. At the same time I continued working on them, trying to go down to bedrock, not knowing how much further bedrock really was. You could not [279] tell where it was by what we call sounding, which is driving down a bar or something of that kind, because there was numerous boulders in there the size of a waste-basket, and some larger. We pumped in there with those pumps and an additional pump after we got down to that elevation, and it was possible to lower the water level to a certain point, but it was impossible

(Testimony of Walter E. Bunker.)

to further lower that water level even though we kept those pumps working constantly. Consequently we could not go down under the water with the equipment which we had and dig those excavations lower down. Practically the same thing occurred with piers number 9 and 10 as with 6 and 7. To the best of my memory those cylinders when I left were from three to five feet below the elevation shown on the plans for bedrock. Daily reports were made according to the time sheets by me. The cost of sinking those cylinders below the elevation shown for bedrock to the depth we sank them according to my estimate was from ten to fifteen, or possibly twenty times as much compared to the cost of sinking them to that point and the cost was increased very rapidly as we went still deeper.

When I discovered the work was not as indicated, I could have completed the total bridge structure had the bedrock been where indicated, in ninety days. We could have completed the bridge about January 1st. The change in elevation referred to by Mr. de Waard in his testimony was this: We were putting cylinders 1, 2, 3 and 4 down—I was not on the ground at the time—the field party of the state came down, ran all the elevations and gave us an elevation on the top of those four cylinders, after the concrete was constructed on that north abutment, in checking over the entire bridge with the cylinders they dug down on these cylinders 1, 2, 3 and 4 and found a different elevation to what they had previously found. They told me that they had

(Testimony of Walter E. Bunker.)

made a mistake in the previous work [280] and now the cylinders stood a little bit above the elevation shown on the plans. According to the first elevation the bedrock in the bottom of cylinders 1, 2, 3 and 4, was within two feet of the elevation shown on the plans. Cylinders 1, 2, 3 and 4 are at the Prescott end of the bridge. The elevations for those cylinders were approximately as indicated on that plan. 7 and 8 I don't know—I did not complete them. 11 and 12 went down below the elevation shown but we managed to get them to bedrock at great expense. The water must have been less at 9 and 10 than it was at 7 and 8, because we were handling it with the equipment we had. 9 and 10 is nearer the shore than 7 and 8. I got the numbers mixed—7 and 8 and 9 and 10 are the ones we did not complete. We completed 11 and 12, which are nearer the shore.

The character of the ground we were working in there was different. We went through compact material and sealed the water out. We managed to get number 11 down on the first attempt by staying with it. Number 12 I worked on it until the top of the cylinder, which is ten feet long, was about a foot below the level of the water standing in the hole when the pumps were not running, and I finally gave that up as a bad job. I moved over to 9 and 10 to see if I could get those down. When I got down to the elevation shown on the plans I was unable to go any further with our equipment. There was no use staying there and just keep work-

(Testimony of Walter E. Bunker.)

ing there and accomplishing nothing, so I would move to another location and see if I couldn't strike better conditions. Ultimately I got number 12 in, but it was after we had got another pump and had gone all the way across, and then came back over here. I tried the pumps which I used on number 12, and on numbers 7, 8, 9 and 10. I was able to lower those some but even those pumps would take the water to a certain elevation and just about hold it. The solid rock [281] elevation as shown on those plans is from three to five feet below the ground. As shown on the elevation, cylinders 1 and 2 show eight feet below the elevation marked ground water line; 3 and 4 show eight feet below; 5 and 6 show six feet below. All those were put in. Seven and 8 show three feet below. That is out in the middle of the stream; 9 and 10 show four feet below and 11 and 12, six feet below; 13 and 14, six feet below. In order to reach bedrock for cylinders 7 and 8, we had to go through three feet of ground water and four feet of ground water in order to reach bedrock for cylinders 9 and 10. Assuming the elevation of the ground water as shown on that plan, in order to actually reach bedrock for cylinders 7 and 8, 9 and 10, it came right about the top of the cylinder. I never checked up to see if the ground water was reduced on that plan. As a matter of fact, however, in some cases we had to go twice as far in the ground water as was indicated on the plans. I remember this in the case of cylinder number 12 definitely. In cylinders 7, 8, 9 and

(Testimony of Walter E. Bunker.)

10, I had to go twice as far to the water, six and eight feet in the ground water.

Thereupon two blue-prints were received in evidence without objection and marked Plaintiff's Exhibits Numbers 52 and 53.

These are the plans (referring to Plaintiff's Exhibits 52 and 53) that I worked from until after the forms for the north abutment were built. When I was ready to pour concrete in that abutment, steel all in place and inspection made, I was informed I did not have the steel in right, and I got my plans and checked up good according to these plans I had, and then I was told there was a tie beam that had to go in across the rear end, and that there was some additional steel that had to go in around the corners of that abutment. There was additional steel that had to go into the wing walls, and there was weep [282] holes that had to go through there or drain holes that had to go through the steel and they had to go in. I was provided with an additional set of plans and they were not the same as these. I made the changes. The cost was a great deal more to make these changes than the ordinary layman would believe, for the reason that when work that you have to get in and tear up is very much slower or retarded. This sheet is marked void in red crayon. I did that to keep any carpenter employed from picking up that plan and continuing the work according to that one instead of the revised one. The inspector on the job gave me that new set of plans. As I remember, the delay in inspection that Mr.

(Testimony of Walter E. Bunker.)

DeWaard testified about was in connection with cylinder number 4; that was the first cylinder put down after I reached the job, and we dug down and hit malapai rock. That was apparently soft. The inspector made an inspection of the material encountered and found that that was not a satisfactory footing for the pier and he did not want to take the responsibility of turning it down himself, so he went into Kirkland to see his superior about it, and he in turn asked the bridge engineer to come out and make the inspection. I don't know exactly how long it took, but after they made the inspection they determined it was not a satisfactory foundation for the cylinder—that we would have to go a foot deeper and when we got everything ready to pour the water came up that night and filled the cylinder, broke over our levee and filled the hole a depth at least three or four feet deep and flooded these forms out of position. The storm continued two or three days, we had to pump the water out, and it left everything in a very wet, dirty, sloppy condition. We had to clean it all out and replace the steel before we could pour.

I have had experience in preparing bids and estimates. If I were called upon to prepare an estimate for the cost of [283] sinking those cylinders and building the piers and abutments, I would rely on the data shown on the blue-print. There is sufficient data shown on the blue-print on which I would feel that I was justified in taking that line as the bedrock elevation. Not to the extent of the

(Testimony of Walter E. Bunker.)

hundredths, because the elevations are not given to a fraction of a foot, but it would be to the nearest foot. If bedrock were not shown on that plan, I could not make an estimate except by going on the ground and making my own test pits. It is a benefit to the party letting the contract to have an indication of bedrock, for the reason that if there were no elevation of bedrock shown, every contractor would have to go there and put his own test pits down and determine where bedrock is, and if there were a dozen bidders on that job there would be a dozen different sets of determination of bedrock and ultimately the party letting the job would eventually pay the cost of all twelve of those different bids. He might not on this job, but it would increase the cost of contracting that much so that it would all be added.

I was not on the job during Christmas week of 1924, until December 29th. I left the job about the 20th of December. On December 20th there were about 10 men on the pay-roll in People's Valley, and nine or ten on the pay-roll on Kirkland Creek Bridge—twenty-nine in all. When I left I had lined out quite a little work, enough to keep those who wanted to work a few days longer busy. They nearly all asked to be let off for Christmas week—that is the custom, anyway. I, having been away from home for several months, left myself. The men worked up to the 22d, then came down to their various homes for Christmas holidays, and on the 28th or 29th some of the men returned to the work.

(Testimony of Walter E. Bunker.)

It was the custom to begin work full blast on the 2d day of January, and I had put on additional men and had made arrangements to put on still more men after [284] Christmas. I had told a carpenter to make arrangements while he was in Phoenix with two or three additional carpenters to come out and go to work. I didn't put on additional men after that because on the 29th of December I returned to Kirkland, and when I got there a man from each camp had telegraphed me that Van Doorn had been out and ordered the work stopped and waiting for my instructions. I met Van Doorn in the Haselfeld store, and asked him if he had ordered the men to stop work, and he said, "No, I did not exactly order the men to stop work, but I told them that if they continued working that they would have to look to DeWaard & Sons for their pay; that the Phoenix-Tempe Stone Company would not be responsible for any further labor by themselves." I think I made the remark to him that I did not know that the Phoenix-Tempe Stone Company were paying the pay-roll. I know about the checks that were turned down to which I have heard reference in this case. I was in San Diego enjoying Christmas. The morning after Christmas I was called to the office and told I would have to be back in Kirkland. Mr. DeWaard told me the Phoenix-Tempe Stone Company had failed to deposit the November estimate in the bank and that the country was full of turned down checks. Mr. DeWaard put some money in the bank in San Diego to my credit,

(Testimony of Walter E. Bunker.)

and told me to come over here and take up those checks with my personal checks and notify him if I needed more money; that he would protect my checks with other money. I came on the 29th. On the 30th I got them work on the ford and on the next day while they were pouring concrete I made a trip to see how many of these checks I could find to take up. I did find and take up quite a number with my own personal checks, then spent a couple of days on the job until I could get away again, and I went to Prescott with the same result and took up a lot of checks with my own personal checks, and pay-day had come and they were demanding [285] their pay, so I paid them with my own personal checks and I bought groceries with my own personal checks in addition to taking up the turned down checks of Mr. DeWaard.

Mr. Van Doorn asked me on the 29th if I would surrender the job or if it would be necessary for him to get an order from the Court. I told him that according to my instructions it would be necessary for them to get an order from the Court. He said, "All right, I will be back with it in a few days," but I did not see any more of him for a few days, and under those conditions I would not increase the crew, because I had nothing to pay them with, and I did not know but what we would get kicked off any time. On the next pay-day I sent in a pay-roll, and instead of getting pay-checks I got a telegram which has been offered in testimony here. On the strength of that telegram I wrote out orders for all

(Testimony of Walter E. Bunker.)

of the men on the pay-roll to the Phoenix-Tempe Stone Company to pay those men and charge to the account of the firm, and sent them down to Phoenix. On the 29th, after Mr. Van Doorn had been out there and told whatever he did tell the men, there was a number of those that had come back already to go to work that left and would not stay any longer. That reduced my employees quite a little. The next thing I got was a telegram from the bonding company wanting me to let them know what authority I had to sign those orders. I signed them "DeWaard & Sons by W. E. Bunker," and on receipt of that authority the Phoenix-Tempe would pay those orders for labor, so I made a trip to Phoenix and brought that telegram with me. They took it to the bonding company and he asked me if I would give him that telegram, which I did not, but I let them make a copy and that is which is offered in evidence. Another thing that faced me down in Phoenix was that I got word of my checks that were turned down. I came down to see if I could get some money out of the Phoenix-Tempe [286] to keep me from getting into jail. When I got there they refused to cover my checks because they were not all labor claims. Those of my checks which were labor claims they would pay, and those which were not they did not pay, and I had to rustle money from other sources to take care of of them. I think it was between the 15th and 20th of January when I left Kirkland.

(Testimony of Walter E. Bunker.)

In the contract as a whole there was 1807 cubic yards of excavation for structure exclusive of bridges 20 foot span or over. When I left the work, as near as I can determine 1,197 yards of the excavation had been done, or about 66%; 607 yards of Class A concrete was to have been poured. About 300 yards or 50 per cent had been poured when I left the job. Class B concrete, all of it, 191 yards had been poured. Of Class C concrete 120 yards out of 184 yards, or approximately 66 per cent had been poured. Of ruble masonry 225 cubic yards, being 100 per cent. Cattle-guards, all three completed, or 100 per cent. Of the 525 linear feet of fence all of the mesh had been hauled out there and the lumber for the posts had been bought and hauled to the bridge, which I would say roughly would amount in cost to around 40%. This was approximate—an estimate; 124-inch pipe was all laid. The 30-inch pipe was all of it laid, 390 feet. The 36-inch pipe was all of it laid, 284 feet. Of the steel for the small structures, of which there was about 20 tons, 50 per cent, or ten tons was installed. Half of the expense of installing that steel had probably been expended. There was one other bridge, 20-foot span or over, besides the Kirkland Bridge, that was wholly completed. There was 325 yards of excavation for these structures of 20-foot span or over. This was 100 per cent completed. 90 yards of back fill was completed. Class A concrete, 292 yards of the total of 532 yards was completed, about 53 per cent. Of the Class B concrete 20

(Testimony of Walter E. Bunker.)

yards, all of it was completed. Of the 140 linear feet of [287] *of* cylinders, 100 feet was absolutely completed; 40 feet more that were down below the elevation shown on the plan for bedrock that did not have the concrete poured in them. I would say that those were about 95 per cent complete, considering the whole fourteen, and had bedrock been at the elevation shown. Of the 66,000 pounds of steel for those structures, about 65 per cent of the money had been expended for installing. About 55 per cent of the steel was in place. There was some bending and other things, and hauling on the rest of it. I am not sure that all of it had been bent, but the greater part of it was bent. As far as I know it was all underground. It was not possible to check up that item whether or not it had all been delivered. It may have been altered from those plans. The 95 cubic yards of back-fill was all completed. The 50 yards of rip-rap was none of it put in. The figures I have given in the quantities I have taken from the schedule in the contract and not from the actual quantities that were actually installed, because I have no records of that. There is always a list of the estimate of these quantities given with the contract, which are approximate, and may be altered more or less in the construction of the work, and were altered somewhat. The contract calls for 140 linear feet of steel cylinders, 14 cylinders, 10 feet each. Whoever furnished those cylinders cut them ten feet each. They were bought and delivered on the job in ten feet sections. They

(Testimony of Walter E. Bunker.)

were furnished by DeWaard & Sons. As far as I know they correspond with the plans in actual dimensions. The plans called for fourteen cylinders of ten-foot sections. I have made an estimate of the amount which would have been necessary to complete that bridge, assuming that bedrock was found at the point indicated on that plan. Four cylinders had to be filled with concrete. Assuming that they were on bedrock, as they were below the elevation shown, I allowed $50.00 for that, making [288] $200.00. Pouring concrete, for which the forms were principally in place and the material on hand, $3.00 a yard for the actual labor of boring, and the steel to be in place, $300.00. For the rest of the bridge the estimate would have required around 3,000 feet more lumber, roughly at $40, so that would amount to $150.00. There was 140 yards of concrete in addition to this, for which the forms were up. It would require 126 yards of concrete at $4.00, which would be $504.00; 63 yards of sand at $2.00 is $126.00. Hauling, unloading, storing cement, $200. Pouring 140 yards of cement at $3.00, including no material, $420.00. Placing steel, estimated in a lump sum at $100.00. The labor of building the forms, 140 yards, at $4.00 a yard for labor would be $560.00. This totals $2,560.00 for completion of the bridge. It is my estimate of what it should have cost to complete it, not considering that you had to put those cylinders any deeper than they were at the time I left there or deeper than the bedrock shown on the plans. If those plans

(Testimony of Walter E. Bunker.)

had been submitted to me to bid on the construction of that bridge, with the set of specifications and the test pits as shown as in here, and those test pits connected by a line, I would feel that I was within my rights to assume that the engineer either knew where bedrock was or that he took the responsibility for it being at the elevation at which he had shown it in the plans, and I would not consider it necessary to go out to the location and put down any additional test pits to check up the engineer's information that he had given, and my bid would be on the assumption that bedrock appeared according to the plans. The specifications do not shed any light on the location of bedrock. They do, however, make a man feel a little more secure because they specified that when the plans and specifications conflicted the plans would prevail.

Thereupon a list of items to complete the bridge and the [289] cost thereof, was received in evidence without objection, as Plaintiff's Exhibit 54.

I have made an estimate of the probable cost for the completion of the balance of the contract other than the bridge. I thought I was talking about that estimate a while ago when I said I had arrived at it by taking the quantities on the subcontract and deducting the amount of the different items shown on the final estimate sheet for Phoenix-Tempe Stone Company by the State Highway Department. Deducting that from this schedule in the contract to show, and leaving the amount that we have got, which if there was any excess quantities it would

(Testimony of Walter E. Bunker.)

give the Phoenix-Tempe the advantage of it. It has been my experience that the schedule of quantities shown in the estimate for a job are usually somewhat under the actual quantities required to complete the job. To complete that part of the contract usually termed, "Peoples Valley," there were yet required 335 yards of Class A concrete, which would cost $15.00 a yard. That would include all material, form lumber and things of that kind, 56 yards of Class C concrete at $12.50 per yard, which shows on the contract that $13.60, amounting to $700.00. There were left approximately 12 tons of steel which were hauled to People's Valley, but had yet to be placed, at $20.00 a ton, or $240.00; 337 yards of excavation at 70 cents a yard, would be $231.00, and at the end of the work would also require about 3,000 feet of additional lumber which I have put in at $144.00. I take it that 70 cents a yard is the cost price; the pay price in the contract was $85.00, and I am figuring this on a cost price. I am not taking the contract price. Since we were taking the contract price on the other one, and from this work yet to be done, since the price was given in the concrete, we have to deduct all material or forms in place that were not filled with concrete. We had hauled 111 tons of gravel, at $4.00, which [290] was $444.00 and 98 yards of sand at $3.00, which is $294.00, and estimated that cement unloaded, stored and hauled to People's Valley, would be the value of about $125.00. Form lumber for forms in place would be the value of approximately

(Testimony of Walter E. Bunker.)

$250.00. That makes the total cost for completing that work $6,300.00. The total deductions of $1,-113.00, leaving $5,187.00 *as* my estimate of what it would cost to complete the work in People's Valley. I have estimated the proportion of the work which was uncompleted.

Assuming that those cylinders had been placed on bedrock, and not considering any of the extra expense for putting those cylinders down below the elevation shown on the plans, I figured that the bridge was between 80 and 85 per cent completed.

Thereupon, an estimate of the balance required to complete the structures other than the bridge, were received in evidence without objection, as Plaintiff's Exhibit 55.

The sum of those two estimates is $7,749.00 for the entire contract. Those cylinders are specified four feet and a half feet by ten feet, and so on for each pair of cylinders through the bridge, making fourteen cylinders, four and one-half feet in diameter by ten feet in length. The character of the structures which is above the cylinders is shown in this little detail here, which is a column two feet six inches square directly over the center of the cylinder, running up to the bridge seat of the pier and those two piers are fourteen feet apart, placing them directly over the center of each cylinder, and they are connected by a reinforced concrete steel 15 inches wide and tied into those two columns and poured monolithic with them extending all the way up to the bridge seat. The bridge seat is a cap.

(Testimony of Walter E. Bunker.)

The wall and posts are formed and poured together. I do not know of any indication on the plan or in the specifications as to what would be done in case those cylinders were not long enough [291] to reach the bedrock. There was additional construction made in order to make those posts of proper length. On top of these cylinders in the two abutments, we took the elevation of the highest one of the four cylinders and on top of each of the other three, if they were lower than that one, we built a square column of concrete four feet square and up to the height of the highest one of the group of cylinders. There is nothing that I know of calling for that in the plans and specifications. That was done on orders from the State Inspector. In my opinion the basis stated in the letter read here for this additional work in lengthening these cylinders which had to be sunk below the line indicated there in order to reach bedrock would not be the proper measure of additional compensation.

I do not want to go through the experience of sinking those cylinders below the line indicated as solid rock again. Down in that cold water, I had men digging there that were standing in water up to their arm-pits at times, because we could lower the water to a certain elevation and they would go down just as deep as they could and when they would get to shoveling, by holding their head up and getting it out of the water, they would stretch their necks and try to keep their nose out of the water until they would get a shovel full of water

(Testimony of Walter E. Bunker.)

and rock and by the time you would get it to the surface you would have about three pebbles on a shovel and there would be a bushel run in almost every time, and in addition to that we pumped the water out of the inside of that cylinder in some of them, and then the water on the outside would rise up and we could not keep that water down and the water would pour in over the top of those cylinders right on the backs of the men working with cold, icy water, and the men would work in there sometimes from ten—eight, ten, twelve and longer hours a day. One time [292] I got in there myself to see if it would be possible to get those cylinders down, and we were like a bunch of drowned rats in there. I would work there at times from three or four in the morning until eleven and twelve at night. We would go down and dig for a few minutes and the water would be out of the hole and we would drop sand bags around on the outside or anything to try and make a little headway, and then the water would break through and so it continued all the way along. This would not have been so bad if the rock had been at the elevation shown on the plan.

I was present when Mr. Conway and Mr. DeWaard had their conversation on the 20th day of October. When I came up to them Mr. Van Doorn, Mr. Conway, Mr. Grant, Mr. L. DeWaard, Jr., and Mr. L. DeWaard were standing on the grade at the north end of the bridge between the bridge and the cementhouse. They were talking in rather heated

(Testimony of Walter E. Bunker.)

terms. Mr. Conway and Mr. DeWaard were doing the talking. Mr. Conway told Mr. DeWaard that he would not give him a letter authorizing him to go deeper with those cylinders until he got a written order to go deeper from the State Highway Engineer, and that it was up to him, according to the contract, to go to bedrock, no matter how deep it might be. He told Mr. DeWaard that his equipment was inadequate; that he was not paying his bills; he told him to quit talking and get to work. He did say he was not going to pay him any money until he furnished evidence that he was paying his bills. I do not know whether Mr. DeWaard was paying his bills at this time; I had nothing to do with the paying of the bills. I don't think I had heard any complaint up to that time; I am not sure about that.

Cross-examination.

Our troubles in putting down these piers was water. Previous to that time they had put down Piers 1, 2, 3 and 4 to a depth as [293] deep as we ever went on Piers 5, 6, 7, 8, 9 and 10, but they went through a different kind of material, and we did not encounter so much water. Pier 12 was one of our bad ones. In none of the piers did we go any deeper based on elevation above sea level than on Piers 1, 2, 3 and 4. If there had not been any water in there we could have gone forty feet down 7, 8, 9 and 10, possibly, without any trouble. It rained while we were putting in Pier Number 4. This was a pretty big rain and it rained after that time. The prin-

(Testimony of Walter E. Bunker.)

cipal trouble with the amount of water encountered was in the sinking of the cylinders and the material through which we were sinking those cylinders. The soil all around the Piers 1, 2, 3 and 4 was a soil through which the water did not flow very much, and the same of Piers 13 and 14, which were not in the creek-bed. In the piers in the middle there was coarse gravel and sand. Possibly we might have had just as much trouble if we had struck coarse gravel below Number 4, but we did not strike it. I found bedrock on the place indicated on the plan on cylinders 5 and 6, and on one of the north abutments. This was not exactly, but near enough to call it at the approximate elevation indicated. On Piers 5 and 6 we did strike bedrock at the elevation shown on the plans, as I remember. I cannot say whether or not I reported this to Mr. DeWaard.

This claim in Plaintiff's Exhibtit, 29, for extra work on October 20th and 21st, on cylinder number 6, represents work that was performed; it must have been digging below the elevation shown on the plans. We did not strike bedrock at the elevation shown on the plans, but it was not as much depth as on the others.

You will notice that on these cylinders there was only a very few days; that was made from the elevation shown on down. We did not strike bedrock at the exact elevation shown for [294] cylinders 5 and 6. On cylinders 1, 2, 3 and 4, we did find bedrock at a more shallow depth than shown on the plans, and I think on the other abutment we

(Testimony of Walter E. Bunker.)

struck on to a boulder on a vertical ledge and that part of the cylinder was dug into the rock and the other side was about two feet below the cylinder. I got the information as to the shallower depth we struck on these other cylinders from the record of the State Engineer. I was not there when cylinders 1, 2 and 3 were dug, but I saw the top of those cylinders, and the only record that I have is *that* the elevation on the top of the cylinders from which I deduct the ten feet to get what the elevation to the bottom probably is. I think Mr. Hoffman was there after having delayed us in inspection, on Wednesday, September 3d. Mr. Grant said he wired on the 2d and Mr. Hoffman was there on the 3d. There was one day's delay. We were not necessarily delayed in inspection for four days, but we were delayed in authority on the wing walls. The inspector held me up and told me not to pour until I got orders from the state. Mr. Oliver and Mr. Grant came over the job and on the north abutment and on the west wing wall, the end of that was not accepted or anything. I had the forms about ready to pour. Mr. Oliver and Mr. Grant thought it might be better to put a pier under the end of that column extending down into the solid wall, and at the time said "put it under" and then the next day the inspector said we had better not put that under until he could get authority from the state and I told them at the time that we could not put that in for yardage, we would have to have extra pay for it, because the yardage would amount

(Testimony of Walter E. Bunker.)

to nothing and then within two or three days they told me not to do anything further on that form until I got orders. Mr. Oliver, the inspector, said to pour as it was without putting the column in; the state did not deem it necessary to put one in. On Pier number 4, I was held [295] up a day to get a man there who had authority. Mr. Oliver condemned that pier and Mr. Hoffman sustained him in it and said it had to go down a foot deeper. No, Oliver did not condemn it; he said he did not want to take the responsibility of condemning it on his own authority, but it looked soft to him. I was told to make the changes from the two pages of a plan which is in evidence here, and I assented to them at the time. I agreed to put them in. It was agreed that I would be paid a little extra. I had no authority to make any agreement as to the price which we should be paid. We are not supposed to do any work for nothing. I do not know what provision the State Engineer acted under. All I could say was, the order was to make the change. There were to be cylinders put in here at the location shown on the plans and were shown to go down to bedrock and were of varying elevations. These piers from the bottom location where they would be on bedrock to the top of the bridge would be varying. The plan would indicate from the bottom of this cylinder to the bridge seat on this pier is a certain distance there, which is the difference between 4,023 and 4,042, and it was not built that way. That particular one we did not build, but

(Testimony of Walter E. Bunker.)

we put it below this elevation 4,025. The bridge was 16 feet center or 12½ feet between the cylinders. The width of the deck of the bridge from bannister to bannister on the rail was, I wouldn't say exactly, but in the neighborhood of 20 feet, and the distance between the inside of the piers was 12 feet. No, I do not say that I expected to find bedrock just exactly like this indicated here on the plan, but I expected, as I said before, either to find it that way or the State Engineer assumed responsibility for its not being that way, showing it on his drawing. It shows that way on the plans and I have no right to question what the plans show. That line at the bottom there [296] would probably be the west side of the bridge or downstream, because it shows there west elevation or downstream elevation. That line which splits here is the ground line. It is marked center line on the bridge. It is one center line because if your center line and your two sides are exactly the same contour they would be directly behind one another. In this case they are indicated so that it shows that ten feet on the right is one elevation here and ten feet on the left is another elevation on this point, but not to the center of the stream bed. That is on the approaches here. This ground line is not necessarily indicated here by this symbol as the center line of the bridge. It says that here, but not out here. This is a solid line and would be either one if you could see it at that point. After the place where the line splits we assume that the three lines or

(Testimony of Walter E. Bunker.)

level is directly opposite one another and hides those from view. This line here is a line indicated upon the drawing to that test pit, which is marked B on this plan. That symbol was designated as bedrock. That hatching means bedrock upon this map. Where I say that symbol in a case of this kind, it means bedrock. These cylinders are shown embedded in bedrock on the plan, and that hatching shows them embedded in whatever that is. We must admit that must be bedrock. This up here shows those cylinders are embedded in bedrock and not in rock. Down here the same thing applies.

There are a number of ways that you can make a test pit. One way, if I wanted to put it on a drawings as this is and connect them with a line so that I could indicate bedrock all along, I might dig a hole with a shovel until I got down to water as deep as I could go. If I did not want to dig that out further I might guess that on down, and I might core drill and I might drill through it and I might let it go awhile and then work down until we hit bedrock or a boulder or something and call it bedrock. [297] I don't know how big the hole that shows there for the test pit is.

The provision in the specifications that says the cylinders shall be sunk to bedrock and the provisions that the basis for payment for cylinders shall be the unit price per linear foot per cylinder are in the Special Provisions. We have not denied that those cylinders differed for going to bedrock. I don't know about the method of payment. I know

(Testimony of Walter E. Bunker.)

there is not a conflict between the plans and specifications. If we thought that we would not be in court. If we thought you could compel us to take the unit price per foot on down, regardless of how deep they go, whether one foot or forty from the language of the specifications itself it reads that it does prevail. There has been no contention on our part as to a conflict between the plans and specifications in regard to the cylinders going to bedrock. I understood that specification to put it down as far as the elevation shown on the plan. If the plans show bedrock at a certain elevation, and when you get there you do not find it, the furnishing of a proper foundation for that cylinder is not work incidental to the putting of that cylinder in place. I never heard of anyone denying the fact that the cylinders must go to bedrock. No, that broken line does not necessarily mean that if that is intended as a representation of bedrock somebody has been down there to look where the bedrock is. That line by its very nature indicates that it cannot be seen. It also indicates that the engineer in the field put three test pits down and he satisfied himself in some way, I know not how. There is nothing on these plans to show that he did not dig more than three test pits, and that he satisfied himself in some way that this bedrock conformed to this line here, or else he would not have put it on the plan that way. If he had not been satisfied he would have shown his three test pits only, [298] without connecting them with that

(Testimony of Walter E. Bunker.)

line. The line from one to the other shows that he has satisfied himself that the bedrock conforms to that line, or that he puts it there and takes the responsibility if it were not there. If those plans show bedrock at that elevation, our contention is sustained.

Q. Now, Mr. Bunkder, the very specifications referring to this contract, contained this provision, did it not: "It is understood and agreed that the contractor has by careful examination satisfied himself as to the intentions of these specifications, the detail of the plans, the nature of the work, conformation of the ground, the character of the material to be encountered and the quantities shown on plans, profiles and cross-sections are approximate only"?

Mr. CROUCH.—We object to that question upon the ground that that is a provision that applies only to the original contractor bidding with the state, and that a subcontractor bidding with the original contractor without any special provision contained in his contract, has a right to assume that the original contractor has satisfied himself as to the measurements and the quantities shown on the plans.

The objection was sustained, and an exception to the ruling noted by the defendant.

Q. This provision of the specifications—"the party of the first part hereby waives any right to plead misunderstanding or deception because of estimates or quantities, character, location or other conditions surrounding or being part of the work,"

(Testimony of Walter E. Bunker.)
was not taken into consideration by you when you stated your rights under the contract, was it?

Mr. CROUCH.—Object to that on the ground that any contract which a man might make which would waive the right to plead deception would be void as against public policy.

Objection sustained and exception to the ruling noted [299] by the defendant.

I do not admit that the provision in the specifications reading, "All questions or controversies which may arise between the contractor and the state, under and in reference to this contract, shall be subject to the decision of the State Engineer, and his decision shall be final and conclusive upon both parties," is binding upon us—that is a question of law for the Court to decide. Under our subcontract we were undertaking to do this work just as the Phoenix-Tempe Stone Company had agreed to do it with the State. I don't know whether DeWaard & Sons would be bound to do any work not covered by the plans in connection with the specifications at any unit price covered in the contract. I don't know whether the matter of the basis of payment for digging these cylinders was in fact submitted to the State Engineer. We would ask Mr. Van Doorn to take up with the State Engineer and get an allowance for extra work for this additional task. I don't know if Van Doorn did take it up with the State Engineer.

I received a copy of the letter written by Mr. Lane, dated October 22, 1924, with reference to how

(Testimony of Walter E. Bunker.)

this work was to be paid for. I gave Mr. DeWaard the date on the elevation of those cylinders which he put in his letter, which is Plaintiff's Exhibit 13. In this letter of October 27th, written by Mr. DeWaard to Mr. Lane, is contained the statement, "Further, we can assure your office that we will work in full cooperation with your representative in the field and carry out his instructions and will speed up the work as fast as possible." That referred to the work as a whole, including the cylinders to the point shown on the plan, and I carried out those instructions to the best of my ability. Those letters also contained this provision: "There is a doubt whether the cylinders can be sunk to bedrock without cofferdams but we will try. However, it will [300] require considerable additional expense," and also the further provision: "The superintendent has orders to try again with improved equipment if he can sink the cylinders 7, 8, 9, 10 and 12 to bedrock. If he should again fail, our opinion is that sheet piling has to be driven or that excavation has to be done with an orange peel and cylinders have to be sunk without pumping. This will require considerable extra time." I did not have orders to drive piles or anything of that kind, but I did have orders to proceed to sink the cylinders if possible with the additional pumps that was put on to so lower the water to sink them. That improved equipment referred to there was an additional four inch second-hand pump. I don't know how much work I did on the cylinders after that

(Testimony of Walter E. Bunker.)

time. The letter of October 27th, Plaintiff's Exhibit 13, contains this statement: "For your further information we wish to state that we paid $12.50 per linear foot for the steel cylinders." I suppose that was put in for the State Engineer's information. I don't know why it was necessary to inform him. I do not admit that the reply to to the letter is an acceptance of the contention that we would perform the work in that manner. I did not give Mr. Lane the information, but it is possible and it was probable that it was done to show Mr. Lane that that would not be a fair and just compensation for performing that extra work. The fact that the extra piles were put in at a later date, is a fact that we were not satisfied with that kind of payment. I did not put those piles in so consequently I cannot tell when they were put in. This letter is dated October 27th. I think those piles were put in around the first of the month following the time at which that extra work was done. I don't know when the first claim for extra work on this job was made. About September 14th, I sent a telegram to Mr. DeWaard and Mr. DeWaard replied with a letter. I said nothing in that telegram about extra work [301] because I had nothing to do with the extra work. I simply reported conditions. Mr. DeWaard in his report makes the statement to be careful and to look out for all extra work. He does not at that time say anything about this particular work being extra work, but he says, "All extra work." I don't know if it was about

(Testimony of Walter E. Bunker.)

October 4th that we first claimed for extra work on these piers. We worked on those cylinders after this letter of October 27th to Lane. On November 10th there is shown here time for men working, pouring and excavating cylinder No. 12. I don't say that is the last date that we did any work on the cylinders. I have not looked at the record day for day after that. I cannot answer without my records whether we did any work of consequence on these cylinders between the 8th day of November and the 20th day of December. I admit receiving the notice of the 9th day of December, a copy of which is in evidence. I did speed up the work when I got that letter by putting on more men and working in People's Valley, and on the 20th of December I went to San Diego. I don't know that about that time Mr. Lane of the State Highway Department notified the Phoenix-Tempe Stone Company that the work at the Kirkland Creek Bridge was in such condition that it could not possibly be completed within the time limit of the contract and any extension that he could ever allow them. I knew that the time limit of the original contract, without any extension, was about to expire. The contract provides that "the party of the second part agrees to do the work herein provided for within a period of seven months from the date of beginning, and at all times proceed with such work at a rate of progress that will insure its completion within said seven months' period. I absolutely knew when I went to San Diego on the 22d day of December that I could

(Testimony of Walter E. Bunker.)

not possibly complete the work in People's Valley by the second day of January. We were not asked for any extra work in People's Valley. [302] We are not considering this contract segregated as to People's Valley and the Kirkland Creek Bridge, but we were taking that as a contract in the whole. It is our opinion if it gave us more time on the Kirkland Bridge it would give us more time on the entire contract. It is the ordinary procedure in construction work to close down for a week at Christmas. We had claims to make for extensions. We had causes of delay which have been presented in court as evidence. We were depending upon the extensions to give us the additional time in which to complete the work.

To the best of my knowledge our men were paid, but some of those checks with which they were paid were turned down. On December 29th when Mr. Van Doorn told the men up there that the Phoenix-Tempe Stone Company would not be responsible for their bills, some of the men quit work because they did not receive money for several weeks back. They had received checks, but those checks were no good, were not paid at the bank on presentation. I afterwards issued checks to these men on my own personal account. The money was put in my name instead of Mr. DeWaard's so that the money could be used for those specific checks. I do not know, but it may be that Mr. DeWaard did not put any money in his own name in any bank in Arizona because he knew if he did it would be attached

(Testimony of Walter E. Bunker.)

again. I did not know the amount of material claims unpaid at the time. I knew there were some claims or they could not have attached the account here. I do not know whether or not after December 20th Mr. DeWaard made any effort to pay the outstanding material claims. It appears from the time sheet that on December 9th we had about 18 men working in People's Valley and 15 on the bridge. That includes cooks, foremen, myself. I had been told before the 9th to put on some additional men. Four extra carpenters were put on in People's Valley the 17th and 18th. These men worked until [303] around the 20th, when practically all went home for Christmas. After December 29th the men were under the impression they would not be paid for their labor and they did not stay there. After Mr. Van Doorn, on December 29th, assured me that he was going to return and take out papers, there was no incentive for us to increase the force at that time. I had, however, before Christmas, arranged with one of the carpenters living in Phoenix to bring additional carpenters after we resumed operations after Christmas. I told him to see if he could get four or five men. I did not get them because of this notice Mr. Van Doorn had given. On January 16th I followed Mr. DeWaard's instructions and turned those men loose, giving them orders on the Phoenix-Tempe Stone Company to pay them for labor. I was there until about January 21st. During that time I claimed, and I still asserted the right that if the

(Testimony of Walter E. Bunker.)

Phoenix-Tempe Stone Company wanted to proceed with that work they must produce an order from the Court. I left before the Phoenix-Tempe Stone Company came up to take the work.

It is approximately correct that it would take $2,560 to complete the bridge, including the work of sinking down these four piers, which we were unable to sink down. I did not say the bridge was between 80 and 85 per cent complete—I said the structures, 20-foot spans or over was between 80 and 85 per cent complete. I never figured the per cent of the bridge. None of the deck of the bridge had been poured when we quit. Four cylinders remained to be put in place. After that letter of October 27th that Mr. DeWaard wrote to Mr. Lane, I was told to put those cylinders, if I could, with the equipment we had. If I had known at the time how much job we might have had to go to bedrock it would have been easy enough to estimate the equipment required, but not knowing that I had nothing to go by except to figure that I might have to go quite a little depth. Mr. DeWaard [304] said it was not up to us to try to determine where bedrock actually existed when it did not exist where it was shown on the plans. He told me that. I simply put the cylinder down as far as I could go with the equipment on hand. From the evidence that I have heard here on the stand, those cylinders did not go down actually as deep as the cylinders 1, 2, 3 and 4. I did not expect the estimate of 140 feet of steel piers to be put into this bridge to be

(Testimony of Walter E. Bunker.)

exceeded. The length of those cylinders is specifically stated. We based our estimate on the plans. I would assume, looking at that plan there the conditions were different to most if that elevation was as it is shown, but we rely on the information given on the plan. Where those quantities are in excess or diminished is that any items covered by the contract are paid for on the unit price paid. Anything that is not covered by the contract is paid for on a cost plus basis. No, the quantities as actually put in are not limited solely and exclusively to what the plans show, because the specifications say that these quantities are approximate. That clause about approximate quantities is put in there because we do not expect a man to go into the detail of figuring this so closely. Under the clause giving the engineer the right to change the plans, he may change anything slightly. He has no right to include or make changes that would make work of another character or nature, and then contend to pay for that as a unit price for some other kind of work.

It may be that the square column put on the top of those cylinders was 39 inches square. This C profile on the plan plans means center profile. I said that it shows there two other lines, one going to each side ten feet out, and that where they come together it would indicate that all three lines that is the line ten feet from the right side, the line ten [305] feet from the left side, and the center line would be at the same elevation. I had no right to know that that would not be at that elevation.

(Testimony of Walter E. Bunker.)

My contention is that it is not positive proof that the line on which the test pits are shown is the center line through the bridge. The other two lines do not go all the way through.

Redirect Examination.

Previous to October 22d, I sent my report to the San Diego office of the work that had been done, and it was up to the San Diego office to put in the claim for extra work and not up to me. Exhibit 11 is an itemized list of extra cost of sinking cylinders, Kirkland Creek Bridge deeper than shows on the plans. It begins September 13th and goes up to and including September 29th. The following is a sum total of money spent, less ten per cent, of $402.91.

Recross-examination.

I don't know if that statement was made up and handed to the Phoenix-Tempe Stone Company before October 4th.

TESTIMONY OF FRANK F. REAMES, FOR PLAINTIFF.

My name is Frank F. Reames; I live in San Diego; my business is foreman; I have been for twenty years. I was employed by DeWaard and Sons on Federal Aid Job 72–A, near Prescott. I started about June 11th with the first starting of the work. I have had a great deal of experience with contractors, including the reading of plans

(Testimony of Frank F. Reames.)

for construction and bridge work. I have constructed bridges. I was on that work until the 8th or 10th of October. I started sinking those cylinders. The first one went down pretty easy. I only had a two-inch pump [306] at that time, The next one we struck a kind of strata of gravel and I could not get it down with a two-inch pump, and I went to work on two others and then left the bank and finished that one. Those four cylinders (indicating cylinders 1, 2, 3 and 4) were poured while I was on the job. I did work on four other cylinders. These two were down below the elevation. These two I never did anything to. That line at the bottom of that plan indicates rock. It says that is rock. The engineer marked it out that way to indicate that there was rock. From my experience in construction, in building a bridge according to these plans I would expect to put these cylinders down to the elevation shown by that line. The elevation would be just the same as if they gave me cut stakes.

There were two rains while I was out there. The first one was in August. At that time we had one of these cylinders partly sunk and the two back ones poured. None of the abutment was ready for pouring at that time. The second rain happened when the abutment was ready for pouring; we had the forms built around for the abutment. The cylinders were poured. The flood came along and filled them up with mud. We had to practically

(Testimony of Frank F. Reames.)

tear them all out. That took time; it took about as long as it does to build.

It was before the first rain when we asked for inspection of the work. Mr. Oliver was the inspector for the State. I can't tell exactly to what elevation we put these cylinders. Those first cylinders were deeper than the elevation shown on the plans from the stake we had there. I made no claims for extra work to the Phoenix-Tempe Stone Company—I made my claims to Mr. DeWaard.

I knew there had been no investigation made of where the rock would be except by these three test pits. We never expected to make any investigation there, but I did know that [307] some kind of a pit had been run down at these three places to find out where the bedrock was. We supposed that was the only places, because that is what it showed us. We never dug down right at the place of any test pit. The closest we got is this pier here. Oh, yes, I take it that the test pits were correct; I still think they were correct. The difference was due to the fact that there was irregularities in the rock; the rock went up and down at different places there and at the places where you put the cylinders it went down lower than what this indicates. I knew that we had made no investigation in here where this line is drawn to determine the actual location of the bedrock, and I had not a bit in the world reason to suppose anybody else had.

TESTIMONY OF LEONARD DEWAARD, JR., FOR PLAINTIFF.

My name is Leonard DeWaard, Jr. Occupation, contractor. Member of the firm of DeWaard & Sons. I arrived on this job about October 20th, and left about October 22d. I was sent from the Big Bear job to see that all the material for the Peoples Valley job, and also some of the material for the Kirkland Creek Bridge was delivered. As Mr. Bunker was in charge of the work and could not very well take care of the delivering of the material which was in Kirkland, I got all the material, such as steel, which was delivered at Kirkland. I saw to it that all this material was sent out to the job. As far as I know, the progress of the work was not delayed because of shortage of material. As I remember, we tried to work in harmony with other subcontractors. The first day I came to Kirkland the matter was brought up about pipe and also the back-filling and excavating for the pipe. Mr. DeWaard, Sr., and myself made a special trip from the bridge to Peoples Valley. The subcontractors [308] names were Willis & Rogers. We made an agreement with them verbally that they should go ahead and excavate for this pipe and put the pipe in and then if necessary for them to go over those structures to fill those in and we would take it out at our own expense; we would pay them for putting in the pipe, so that any delay in getting in these culverts would

(Testimony of Leonard DeWaard, Jr.)

not hold up the completion of this contract. We had quite an amount of equipment there, and I think if they had not struck so much water the equipment on the job would have been plenty.

On November 22d, all the steel for the culverts in Peoples Valley was on hand. Also a great deal of lumber delivered to the various places and all the pipe on the job were at each structure. Also all of the wire mesh for the guard rails was delivered and the lumber for the posts for the same was delivered to the bridge site and some to the other camp at Peoples Valley. Material for the cattle-guards was all delivered. Cement was stored at Kirkland Bridge and at Peoples Valley Camp and at two or three of the different structures of the culverts. I did not try to see how many yards of rock was delivered to each structure. There was quite a quantity of rock delivered to the structures of Peoples Valley and a number of yards of rock crushed at the Kirkland Bridge. I heard one of the officials of the Phoenix-Tempe Stone Company tell my father that they would not pay him a cent for sinking those cylinders down below the places shown on the plans.

Cross-examination.

This conversation took place about the first day that I arrived on the job. My father pointed out Mr. Conway to me. Mr. Van Doorn was also there, and Mr. Grant, and another gentleman from the bonding company. The matter was brought up

(Testimony of Leonard DeWaard, Jr.)

about the extra work on the cylinders, and I was standing pretty close to the affair, and Mr. Conway notified Mr. DeWaard telling him [309] he would not pay him a penny for sinking these cylinders down. It has been quite a while ago now that this took place and I would not come right out and say or swear to it that I can mention the words. We had another job on hand at this time besides this job and the Big Bear one. So far as I remember, all the equipment and material on the job had been accepted at the time when I left there. I do not know whether such acceptance was in writing.

The rate of the work in Peoples Valley at that time so far as I could see was going very satisfactorily on the structures. I do not know whether if it had continued at that rate it would have been finished by the second of January following. I don't remember whether we were building about a culvert a week at that time. I do not remember how it came about that the arrangement with Coleman, Winsor & Rogers was entered into. I don't know whether the work of Coleman, Winsor & Rogers was further advanced toward completion than our work. I have nothing to do with the subcontractors. I don't know whether there was a similar arrangement with Gore and Maze or not.

I would not try to make an estimate of how far the work of putting in the cylinders was completed when I left the job. I have an interest in the firm.

TESTIMONY OF W. W. LANE, FOR PLAINTIFF.

My name is W. W. Lane. Occupation, civil engineer, employed by the Arizona Highway Department as civil engineer. I have been such civil engineer since May, 1924. At the time these plans for this work were drawn I was Assistant State Engineer. I had supervision of the engineering on that bridge throughout. I am familiar with the specifications, contract and plans. I have the original contract under which the Phoenix-Tempe Stone Company agreed to construct this bridge, and the specifications. [310] Turning to Page 4–2 of the Specifications, I find the provision that when so directed in writing by the State Engineer, the contractor shall furnish materials and do extra work not otherwise provided for by the terms of this contract, but which may be connected with or necessary to the proper completion of this work. The price paid for extra work shall be determined by the reasonable direct cost of materials and labor furnished by the contractor. That is the basis of payment for which we cannot reasonably class in the contract. Additional work is where work in addition and of a similar nature of that called for in the contract. It is paid for according to the unit price bid in the contract or else a special agreement is arrived at. (Reading from Specifications:) "Work that can be reasonably classified and paid for at unit prices specified in this con-

(Testimony of W. W. Lane.)

tract shall not be regarded as extra work." Extra work would have to be outside of any provision in the contract, but would be work that would have to be done to complete the contract. Under the same heading of extra work, on page 4–2 of the specifications, Clause C, ways: "The contractor shall furnish evidence of cost in such form and at such times as the engineer may direct," and Clause D, says: "In the absence of satisfactory evidence of cost, the engineer shall determine a reasonable price." We read E this morning, and the last Clause of that is F: "No payment shall be made for extra work not authorized by the State Engineer. Now, in addition to that, every classification of work has its own basis of payment inserted in the contract, which covered the class of work that is being done. For work that can be reasonably considered as coming under the unit price bid the basis of payment is the unit price bid, and if it cannot be reasonably so classified, then it falls under the extra work clause, or a special agreement may be made with the contractor, mutually agreed to. Before you could [311] change to another method of payment there would have to be some mutual agreement. Under the contract, if it was extra work it was to be paid for at cost plus ten per cent, and if it was the same work, that was unit prices.

That bridge was built according to plan with the modifications that we made. It was built in accordance with the plans and specifications, which

(Testimony of W. W. Lane.)

provides that we may make slight changes in the plans. There were slight changes made in the plans. I believe the changes in the plans necessitated the doing of more work; the changes made in the plans in this instance involved slight additional quantities, but not extra work. In the tie-beams, I believe we did class a slight amount of extra work and paid for it according to the additional amount of labor required. Also the placing of additional steel in the abutments. There was the addition of a tie-beam in the abutment and some additional steel in the abutment which we classed as extra work, due to a slight change in the plans. The job was a Federal Aid job and after it was started they requested that we make those changes in the plans. There was some addition made to the top of the cylinders, but they were made as an alternate to increasing the height of the cylinders themselves in the form as shown on the plans. We did not class that as extra work; it was additional quantities, but we gave the contractor the right of either putting those blocks on top or else getting additional cylinders to bring the cylinder height up. That necessitated additional work in the way of construction of forms. I do not believe that would be classed as extra work under our specifications pertaining to the cylinders. Our specifications state that the cylinders shall be sunk to bedrock. Loose and soft rock shall be removed from the surface of the bedrock, allowing the cylinders to rest firmly on the solid surface. Anchors shall

(Testimony of W. W. Lane.)

[312] be placed as shown on the plans; the cylinders sealed and filled with Class B concrete. No concrete shall be placed under water except as provided in the standard specifications No. 9. Section 10, and the basis of payment for that, shall be the unit price per lineal foot of cylinder named in the proposal schedule for cylinder complete in place, including the placing of concrete and anchors and the furnishing of all material except cement and reinforcing steel, labor, tools, equipment and work incidental thereto." We entered into a supplemental agreement with the Phoenix-Tempe Stone Company as an alternate for carrying the steel cylinders or adding to the steel shell and bringing them up as the remainder of the cylinders were. The agreement was signed the second of April, 1925, and the supplemental agreement was drawn up from the letter that I wrote them as to how they would pay for that and how we woud consider them to be paid for. We gave them an alternate, not using the steel, and deducting the steel from the payment.

Thereupon supplemental agreement, dated the 2d day of April, 1925, was read into the record without objection, as follows:

"Supplemental Agreement. Supplemental Contract on Federal Aid Project No. 72–A, White Spar-Congress Junction Highway, by and between the Phoenix-Tempe Stone Company, party of the first part, and the State Engineer, acting under the laws of the State of Arizona, party of the second

(Testimony of W. W. Lane.)

part, Witnesseth: That whereas, the steel for the cylinders for the Kirkland Creek Bridge was ordered at a specified length that does not fit the actual required length of said piers and whereas, it is not necessary that the steel cylinders extend all the way to the top of said piers. Now, Therefore, the party of the first part agrees to accept change in the design of the piers of the said Kirkland Creek Bridge and modifies this contract as follows: That it will construct the said piers under the design furnished it [313] *it* by the party of the second part, namely that the upper portion of said piers, being the portion that will extend up above the length of the steel cylinders as ordered in the said contract, shall be made by the construction of a square column without the use of the steel cylinders, and that the party of the first part will do all necessary work to comply with the design in said piers and change involved only the changes above referred to, at a price of $27.25 per lineal foot, it being understood that the waiving of the steel cylinders on the part of the party of the second part is equivalent and accepted to be $12.75 per lineal foot. It is mutually understood and agreed that this agreement is a part of the contract on Federal Aid Project No. 72–A, Prescott-White Spar Highway by and between the parties hereto. Witness our hands and seals this 2d day of April, 1925. Phoenix-Tempe Stone Company, by E. P. Conway, President, Party of the First Part.

(Testimony of W. W. Lane.)

W. C. Lefebre, State Engineer, By W. W. Lane, Chief Engineer, Party of the Second Part."

The price in that agreement is something like $64 a yard for concrete. Some of that concrete was built by DeWaard & Sons. Our office gave them monthly estimates for their work. The estimate wasn't given on the basis of $64 a yard for concrete. The estimate was given on the footage of the cylinders—it would be equivalent to about $64 a yard. The supplemental agreement does not say it will be paid for on a yardage basis, but on a footage basis. I make it $725.12 that the Phoenix-Tempe Stone Company received because of the lengthening of the cylinders in this way. We made the supplemental agreement in order to relieve them of ordering additional steel and holding up the job until they got it on the job. The steel that they had on the job was too short. The plans show ten foot cylinders. If that is considered a specification, we specified ten foot cylinders. [314]

We did not have any dealings directly with Mr. DeWaard. We considered it necessary to have an agreement between ourselves and the Phoenix-Tempe Stone Company to make an alternate. An alternate is something that may be used in lieu of something else. I guess you could say it was different. There was no reason for the state to pay for something that it did not get. I considered that supplemental agreement a part of the contract. It was not contemplated at the time the original contract was drawn because the actual

(Testimony of W. W. Lane.)

conditions were not ascertained at that time. At the time the original contract was drawn we contemplated what the plans and specifications showed, namely, that we could build the bridge with a ten-foot cylinder, with the limits allowed under our specifications. I do not admit that the bridge was not built according to our contract. I never saw an estimate between the Phoenix-Tempe Stone Company and DeWaard & Sons. The only change made by this supplemental agreement was that it permitted them to not use the steel cylinders on that extra height. It did not put on a different price, it merely deducted for something that they did not use—deducted an amount for the material they did not use. That work is covered by the original contract. The original contract specifically state all work incidental thereto and that was something incidental thereto. I did not draw the plans—they were drawn under my supervision. We show cylinders ten feet for a matter of convenience in ordering the cylinders, so that the contractor could place his order, get his cylinders on the ground and not be held up by waiting until he got down to his specific lengths of cylinders. We estimated that they would be an adequate length; we believed that at the time. We based this on three test pits there, and from that we assumed that bedrock was approximately as shown by those pits. The contractor could rely on that to order his cylinders, but a contractor is bound to know that a test [315] pit that does not cover the entire area

(Testimony of W. W. Lane.)

of all these footings, and as there is no dimensions or any elevation shown for each individual pier and as our specifications specifically stated it was to go to bedrock at a unit price bid, he certainly had every reason to believe that he should make a study and at least check that determination as made on the plans. We believed that we had found bedrock at the test pits. We made the assumption that bedrock was at the point of the test pits. That assumption was used as the basis for designing the bridge and to give the contractor the information we had as to the probable depth of bedrock. Our specifications require that a contractor shall familiarize himself with all parts of the work. He does not necessarily have to take our assumption as being correct. The contractor ordered the cylinders. The state ordered the steel. I presume it was cut to fit ten-foot cylinders. This is a test pit here at Station 396 plus 50. The test pits are approximately six feet square. The only information we had and the only thing that indicated or attempted to indicate here was that we struck rock at that point. On the plan it is only intended to indicate that we struck rock at that point. There is no elevation shown at the base of any pier. I do not se that the plan shows the cylinder up at the same elevation as the bedrock elevation at the bottom of the test pit. The test pit is not presumed to cover any more area or territory than you can cover in the test pit itself. These test pits are placed on the center line and are under the cylin-

(Testimony of W. W. Lane.)

ders. Where you have 14 cylinders to support a bridge and you want to determine the bedrock accurately for the base of each cylinder, you would have to put down 14 test pits. We do that on some of our bridges. We did not do it on this bridge because we did not think this was of sufficient consequence to justify the expenditure. Bedrock would be approximately where it is indicated [316] there. We classified that as an unclassified bid. He bid to go to bedrock according to the contract, irrespective of how deep he had to go. If he had run into something that we might have classed as extremely unusual we probably would not have expected him to go broke on it. We would probably have entered into some agreement with him at that time. We did not enter into the supplemental agreement with the Phoenix-Tempe Stone Company to cover this situation. We did not figure it was sufficiently unusual to class it outside of the contract. We made the supplemental agreement as an alternate to permit them to leave off the steel cylinders. I would say that if the Phoenix-Tempe Stone Company had not been willing to make this supplemental agreement they would not have been entitled to be paid cost plus ten per cent. I don't recall that DeWaard & Sons submitted to us a claim for moneys expended between the 13th of September and the 29th of September, of $402.91, for actual expense in going down deeper than these plans show. I don't know whether they made such a claim to the Phoenix-Tempe Stone Company. I

(Testimony of W. W. Lane.)

heard of disputes between DeWaard & Sons and Phoenix-Tempe Stone Company. I do not recall whether the Phoenix-Tempe Stone Company submitted to my office for approval the claim which is this Plaintiff's Exhibit 11, for $402.91. I do not recall having seen it. I do not recall seeing these other claims for extra work. I have a file here, and if they did submit it to us for our files, I would have it. All I see in our files is a statement on cylinders 11 and 12. Eleven is for $135.25 and on 12 for $135.75, which was transmitted to us by DeWaard & Sons in a letter from them under date of October 27th, and that was not transmitted as a claim for approval, however, as they would not submit a claim to us for that.

Thereupon paper entitled, "Extra Cost of Sinking Cylinders, Kirkland Creek, Deeper Than Shown on Plans, November," showing [317] the sum of $156.84 expended, was received in evidence without objection as Plaintiff's Exhibit 56.

Thereupon, similar statement covering statement, October 8th to October 28th, amounting to $822.54, was received in evidence without objection as Plaintiff's Exhibit 57.

I do not recall having seen either of these statements. We do not keep any record on their expenditures. It is possible that DeWaard & Sons may have actually spent $1,382.29 between the 13th of September and the 28 of October in trying to get those cylinders down deeper than shown on the plans. This cylinder was put down to bedrock. I

(Testimony of W. W. Lane.)

haven't the records with me showing the depth of those foundations.

Thereupon blue-print marked, "Kirkland Creek Bridge Prescott Arizona Highway, Sheet 14," was received in evidence without objection as Plaintiff's Exhibit 58.

Cross-examination.

I do not know of anything unusual about this plan for the construction of the bridge that we have posted up here. It has been more nearly the general plan than any other plan that I know of. It is not the only type of plan used for designating the depth to which cylinders such as those will go. Sometimes on jobs we specify the actual depth to which they are to go at unit prices, or at a lump sum bid. In case we do that the plans show the base of the piers. The elevation that they are to go in accordance with the plans and in accordance with the unit prices bid, or the lump sum bid. When we do that we sometimes do as we have here, and sometimes we actually make soundings for the cross-section of the piers. If we had had the idea in mind to absolutely specify that depth and have that price govern to a specified depth, we would have so specified it on the plans as to the individual piers or cylinders, or as a line for the total bridge and paid on a different basis below that. [318] We would have indicated an elevation in figures at the bottom of the same, or else we would have covered that in our specifications. We assume the broken line on this plan as the bedrock. To me as an engineer,

(Testimony of W. W. Lane.)

it is not an assertion or a positive declaration that bedrock will be found at the location of that line. I don't see how a practical construction man could have taken that line as a positive line, because the test pits shown here indicate that is the only way we had of obtaining any information, and we only obtained it at those points and not beyond the area of the test pits. I do not believe it is possible for a plan of that kind to show the contour of the bedrock absolutely, without exposing it throughout. You could do it without exposing it by sounding or drilling a certain number of holes to actually determined it, but you could not do it by putting them some 80 feet apart, as this is here.

I recall that Mr. Van Doorn came in several times and we talked about the manner of paying for these cylinders. I believe my letter of October 22d was my first determination of the matter. (Letter read to witness.) That was my determination, at that time on putting the cylinders to bedrock and as to the basis of payment. The basis of payment was payment for sinking the cylinders in the contract, which was unit price per linear foot of cylinders named in the proposal, schedule for cylinders complete in place. My determination was that they would be paid on the unit price per linear foot which they had bid for every foot of cylinder they put in there, and that for that price they must put these cylinders down to bedrock. I don't say that had there been ten foot extra that we would not have given them some other compensation, but that

(Testimony of W. W. Lane.)

was my interpretation of the contract, that the contract required them to do that. I offered to make another provision for them by whech they would get something better than what I considered the contract gave them. I gave that [319] to prevent them, as I have previously stated, having to order additional steel for the cylinders and being delayed while they were receiving that, but I did not require them to use that; I left that optional with them. I don't know whether the letter was communicated to DeWaard or not. Subsequent to that letter, however, I received a letter from Mr. DeWaard which is Plaintiff's Exhibit 13. I take it from thos correspondence that this proposition of the alternate offered in my letter of October 22d, was in the possession of Mr. DeWaard prior to October 27th. I did not offer the Phoenix-Tempe Stone Company anything further or different after Mr. DeWaard had left the job. The supplemental agreement was based on this letter of October 22d, and the further letter that I wrote on October 31st, on this same matter. Before this letter of October 31st was written, reports came to us from men on the job that they had already constructed some of the cylinders in accordance with the square form without the use of steel shell. In my letter of October 31st, I stated first what my construction of the contract required them to do, and then I offered them something else that might answer the purpose if they would make the supplemental agreement with me. As a matter of fact some of the work had already been constructed

(Testimony of W. W. Lane.)

in accordance with this letter at the time I wrote it, and it was afterwards all finished in accordance with this letter. Before I paid for it I required this supplemental agreement, which was not actually put in writing until the cylinders were completed. I don't see anything in Mr. DeWaard's letter of October 27th in regard to extra work unless I have overlooked it somewhere. The alternate that I offered in my letter of October 31st was the same as the alternate I offered in my letter of the 22d. There is nothing in Mr. DeWaard's letter of October 27th protesting against that offer, and he actually [320] did some of the work in accordance with that letter. I don't know that the question of extra work was actually presented to me. We discussed the basis of payment that was my interpretation of the contract as to how it was to be paid. I do not recall all of our conversation on that as to whether the extra work was really figured on or not. I do not know whether it was worth the amount of money Mr. DeWaard claims to have expended to sink those cylinders down to bedrock. I never examined it. It is my opinion that the test pits were actually put on the center of the bridge. The plan states at stations so and so in every case. It does not say so far on either side of station so and so. A station as we used it is every 100 feet is considered one station, 100 feet along the center line is considered one station. Those stations are always on the center line unless they are specified otherwise. I do not believe that in

(Testimony of W. W. Lane.)

this case they are specified otherwise. It indicates on the plans here, C 'profile is a center line profile. When we get over here to the test pit, that is an extension of the center line profile. This line extending down here is the center line profile as shown by the plan. It does show that the test pits are located on the center line. Apparently it does not show on the plan that any cylinder is located upon the hatchway. On a profile of course you can't show a distance back and forth on this elevation, so the depth will be the same even though this might be ten feet to the front or ten feet to the rear. This line is not the same as these dashed lines. It is not a dashed line but a broken line. You will notice that this line here is not a line given for the hidden parts of the structure. I don't know that the broken line has any general significance except if we had had a positive line there, or a line that we would have considered as positive, we would have shown that in a positive line, not a broken line. We would have used [321] a solid line or a dashed line similar to the lines we used there, but this is not a dashed line but a broken line, and it is not the same character of line as the other dashed lines on the plans.

I had my attention called to the progress of the work on Kirkland Creek bridge several times.

Thereupon letter to the Phoenix-Tempe Stone Company from W. W. Lane, dated December 26th, 1924, was received in evidence without objection as Plaintiff's Exhibit "G."

I wrote that letter at the time it bears date.

(Testimony of W. W. Lane.)

There was some provision for allowance of time or extension of time upon certain conditions in the contract between the state and Phoenix-Tempe Stone Company. I don't know anything about the subcontract with DeWaard.

There never was any unusual flood on this road during the time of construction. I was not on the job, however.

Redirect Examination.

I did not communicate to DeWaard & Sons the fact that the contractor, Phoenix-Tempe Stone Company had an extension of time until the 15th day of February.

Thereupon letter of December 24th, 1924, from Phoenix-Tempe Stone Company to the State Engineer, was received in evidence without objection as Plaintiff's Exhibit 59.

I do not recall definitely if it is true that for thirty days prior to December 24th, 1924, the weather conditions were such that it was practically impossible to accomplish any work on the job. I do not recall that we considered it a reasonable statement that they made in this letter that it might be impossible to get the necessary clear weather to finish the work until early spring. We gave them only 45 days instead of 90. Our records show that there was quite a bit of work to be done. [322] Completion was not anything like one hundred per cent. In this letter I stated that I did not consider that they were entitled to any extension whatever by virtue of the delay on Kirkland Creek

(Testimony of W. W. Lane.)

bridge. I don't think that the delay on Kirkland Creek bridge was almost all due to the fact that the bedrock was not as shown on the plans. The Phoenix-Tempe Stone Company did not finish within the 45 days. Under date of February 14th they requested a 60 days extension of time. I do not recall that the extension was granted.

Thereupon a letter of February 14th, 1925, from the Phoenix-Tempe Stone Company to the State Engineer was received in evidence without objection as Plaintiff's Exhibit 60.

The extension requested in that letter was denied. I don't remember when the work was finally completed. The final estimate was made in July. I do not recall on what date written acceptance of the work was made.

Thereupon it was ascertained from Mr. Grant, who was present in the courtroom, that Friday, June 19th, 1925, was the date of the acceptance of the work.

The complete final estimate, marked "July," shows all of the quantities of the various classes of the work, including all previous estimates.

Thereupon final estimate was received in evidence without objection as Plaintiff's Exhibit 61.

I was under the impression when I wrote that letter of November 22d, that the tops of the cylinders was shown on the plans. I know now that they were not. I thought it necessary to write another letter about a week later to clarify that when I found it was not true. I was not so particular about that

(Testimony of W. W. Lane.)

point and probably would not have mentioned it had it not been that they had already placed some cylinders. I submitted another letter in lieu of the other and I wanted it correct [323] all the way through. I don't see any elevation on the plans for that cylinder. I see sand and gravel to rock and elevation 4,023, at station 396 plus 50. I certainly mean to say as an engineer that these plans do not show the bottom of that cylinder at the elevation. This particular notation here says Station 396 plus 50, sand and gravel to rock, elevation 4,023. The pier is not at that station. I stated a while ago that it was within an inch or two, somewhere near, but not at that particular elevation. It is not intended to be shown at that particular elevation. This line is not necessarily a parallel line. It is merely a free-hand line and that line may vary considerably between those two points. The elevation as stated here is for those particular points and not for the point where the cylinder is. We could not have shown it running either up or down, necessarily, if it varied considerably. When we drew this plan we did not necessarily intend to show the bottom of that cylinder within an inch or two of that elevation, as the bottom of the test pit. Had we intended to specify and show the absolute elevation for placing those piers, we would have put it in the plans. We sank that test pit to determine the approximate location of the bedrock. Generally, we were trying to find out where the bottom of the cylinder would go. I would say from

(Testimony of W. W. Lane.)

that plan it was somewhere near the elevation shown at this test pit. There is no elevation shown on the pier. It is not shown here that that cylinder is ten feet high, so that all you would have to do to determine from these plans the height of the top of the cylinder would be to add ten feet to that. The amount paid under the supplemental agreement was less in actual cash than it would have been under the old unit price, by the amount of the cost of the steel which they did not have to buy, haul and place. The difference between the price in the supplemental agreement and under the original agreement is [324] the difference between the cost that they gave us for the purchase freight, hauling and placing of the steel for this number of feet.

Recross-examination.

The difference is the cost of the steel cylinders that the contractors save by not having to buy them, except that when they change to that square construction up there it did not require as much concrete as if they had put all the cylinders in the circular construction. We paid them just the same as if they had made the circular construction, less the steel shell. There was a little saving to them under the alternate plan, if the item of $12.75 is correct for the items on the steel. I think the weather held them up slightly on the Kirkland Creek bridge but the work was not progressing with the proper rate of progress. Mr. Grant who was the resident engineer on the job several times in conversation to me

(Testimony of W. W. Lane.)

reported that the equipment was not adequate to carry on the work and in view of that fact he condemned one concrete mixer. Now, the first extension that the Phoenix-Tempe Stone Company asked was on December 26th, and was for 90 days and we gave them 45. Then later they asked for one for 60 days and we gave them nothing. They finished the contract subject to a penalty and they paid the penalty, but we class it as engineering costs. I can't tell from the final estimate what they paid on that account. The final estimate was signed and approved on the 10th day of July. I believe that Mr. DeWaard filed some kind of a claim out there with us asking us to hold up all of this money and we did so for a long time, until we had authority from the attorney general to pay it. That claim Mr. DeWaard presented to us was for $61,502.22.

Redirect Examination.

The only penalty the Phoenix-Tempe Stone Company had to pay to finish this work was that they had to pay the engineer's [325] inspection fees incident to the additional time.

Recross-examination.

If the work had continued to drag we probably would have taken it away from them.

TESTIMONY OF C. W. BARNETT, FOR PLAINTIFF.

My name is C. W. Barnett. Residence, Phoenix, Arizona. Occupation, carpenter. I worked on the Phoenix-Prescott Highway after the 4th of July, 1924. Quit about the close of that year. We had difficulty in regard to water at Kirkland Creek bridge. They had great trouble there getting water out. There was two pumps running at that time. They would start those pumps early of a morning so as to keep the water out for the workmen to get those down. I worked all over the job from one end to the other. There seemed to be plenty of men on the job. We had a pretty good outfit there along towards the last. At first we had some trouble with the mixers, but then he got some good ones. I heard no complaint from anybody about the equipment being unsatisfactory. I heard no complaint of there not being enough men working on the job. There seemed to be about as many on the job as could be put on it and work to advantage. Yes, I had to cut steel; some of it for the scow boxes. I was working there just before Christmas. I do not know exactly, but it seems like there must have been some 22 or 23 men there at the time on the People's Valley end. I don't know how many there were on the bridge, I had left there and gone over to People's Valley. There was a time or two in August we were out of material. We had too many carpenters for what they had to do and we had

(Testimony of C. W. Barnett.)

material to go ahead with the work. I should say there was about six or seven carpenters there. They were idle for only a day or two at a time. I have never [326] been in a place yet but what you could lay off on holidays. I frequently saw Mr. Grant. Neither he, nor any of the inspectors, nor anyone else, ever made any complaint or criticism because of the work not going on. I never heard any complaint from Mr. Grant nor any of the inspectors, or the Phoenix-Tempe Stone Company, to anybody, that the work was not being prosecuted expeditiously. They made some change on the plans for the steel on the Kirkland Creek bridge. They made some changes on the lower end of the wing of the scow boxes that did not amount to a great deal. I know we had trouble to get over one of the hills. I had to drive my machine as far as I could get and then carry my tools on my back the rest of the way—maybe it was a half or three-quarters of a mile. I saw the water boiling over the top of the cylinders while they were being sunk. There were levees thrown up there and sacks of sand and stuff put in to keep the water from running in there. I believe Mr. Van Doorn came down there just after Christmas and inquired about the work. I told him there were some carpenters working and he spoke about that he wanted to notify those men to stop work, and that if any of us worked after that the Phoenix-Tempe Stone Company would not be responsible for the cost of it. He asked me where Mr. Bunker

(Testimony of C. W. Barnett.)

was and I told him he had gone to San Diego for Christmas, and we were expecting him that evening or in the morning. This was after Christmas. I think Mr. Van Doorn drove up to the rest of the men. I don't remember Mr. Van Doorn saying that if we wanted to work we might, but the Phoenix-Tempe Stone Company would not pay us. I don't know who it was that was with Mr. Van Doorn. Yes, we had some checks that we had not got our money on. The Phoenix-Tempe Stone Company paid me the last check on January 28th. The place where we had to walk was south of Kirkland Creek, before you got to the top of the hill. [327]

The steel I cut was a small task. It is generally thought that from Christmas to the first of the year is laying-off time.

TESTIMONY OF L. DEWAARD, FOR PLAINTIFF (RECALLED).

I never agreed to any supplemental contract with the Phoenix-Tempe Stone Company. I at all times, from the time I found that bedrock was not at the place shown on the plans, contended that under my contract I was to be paid cost plus ten per cent and demanded an order. I had found from bitter experience that unless I got a written order I would not get paid for it. I had not the slightest idea how far I would have to go down with those cylinders to bedrock. I had previous

(Testimony of L. DeWaard.)

experience with a situation of that kind. The Pinto bridge in San Diego cost me $18,000. They finally had to drive piles. I had another experience with Meyer Creek bridge, in Imperial Valley, on the California State Highway. They waited for three months for our written order, then the Highway Commission came out and gave me a writing to go deeper, and it cost $22,000.

That bottom line there is not a center line. The center line does not go to this part of the bridge. If the Phoenix-Tempe Stone Company had made me the proposition of $64 a cubic yard for building those additions I might have gone on with the bridge. I never heard about it—the $64—they did pay me $13.65, I believe. The highest concrete price that the Phoenix-Tempe Stone Company allowed me was Class A concrete, $13.60. The highest price for any concrete that I was allowed was $21.25. I would have built that bridge without any doubt in the time specified in the contract without any trouble if they had given me order and paid me extra cost plus ten per cent. I offered to go to the State Highway Department when this controversy started that he might settle it at that time, and he said, "No, we take [328] care of that."

Cross-examination.

I remember that I received some kind of a letter that asked me to come to Phoenix and talk this matter over. All that I wanted was an order to go ahead according to cost plus. I did not know of

(Testimony of L. DeWaard.)

Mr. Lane's proposition of the supplemental agreement. The first time I saw the supplemental agreement was this morning.

The station is not always located on the center line. It was here and it was in People's Valley. On this job the stations were all located on the center line. The station means 100 feet to 100 feet there. This plan shows the cylinders placed on the downstream side. The test pits connect up here with this line. These three lines connect here to give the creek bed, nothing else. I do not claim that the test pit is on the one side or the other—it is in the center. It shows what elevation your rock is and it shows clearly that your pier is on the same elevation as the test pit. I had litigation over the same situation on several bridges in California and they always paid it.

Plaintiff rests.

Thereupon, defendant Phoenix-Tempe Stone Company and Maryland Casualty Company made their motion for an instructed verdict upon the following grounds:

1. The Special Provisions of the Specifications expressly state that the cylinders are to go to bedrock. That the proper construction of the contract as a matter of law is that the contractor is obliged to put those cylinders on to bedrock, and therefore the allegation of the complaint that the plaintiff was justified in refusing to proceed with his contract is not made out. [329]

2. Upon the ground that if the view is taken that there is no discrepancy between the specifications and the plans, the special provisions of the specifications by the terms of the contract and the specifications prevail over the plans, and further that the plaintiff is bound by the testimony of his witness Lane as to this construction of the plans and specifications.

3. Upon the ground that the specifications provide that if any dispute or difference arises between the contractor and the State, such question shall be determined by the State Engineer as arbitrator, and that his determination shall be final and conclusive.

4. Upon the ground that it appears from plaintiff's own testimony that he failed to complete his contract according to its terms. There being only one breach alleged in the complaint, which would be considered sufficient to justify him in not continuing with the work, and that is the alleged failure to give the order for extra work on the cylinders. The evidence shows that plaintiff went ahead and insisted upon the right to perform this contract and continued to persist in the performance of it up to the 31st day of January, and thereby elected to proceed with the performance of the contract.

5. Upon the ground that the letter of the State Engineer offering an alternative proposition for proceeding with the contract, the plaintiff's letter of October 27th, replying thereto, is an acceptance

(Testimony of Edward Van Doorn.)

of that proposition, together with the fact that he actually did proceed in accordance with the alternative proposition after having made such election plaintiff was not at liberty to turn back and say he still had the right to refuse to proceed with the work.

The motion for an instructed verdict was denied and exceptions on behalf of Phoenix-Tempe Stone Company and Maryland Casualty Company noted. [330]

Thereupon, defendants Phoenix-Tempe Stone Company, and Maryland Casualty Company, offered the following testimony which was received by the Court as hereinafter set forth. [331]

TESTIMONY OF EDWARD VAN DOORN, FOR DEFENDANTS.

I have resided in Phoenix about fifteen years. I have been a contractor about seventeen years. I am a third owner in the Phoenix-Tempe Stone Company, which is a corporation. I own one-third of the stock. Power Conway and Robert Baker own the remaining stock. I have had experience in the building of bridges. I participated in making the bid to the State of Arizona for the performance of the work of the Phoenix-Tempe Stone Company for the White Spar road between Kirkland and Prescott. The plans were Plaintiff's Exhibit 3, which is pasted on the blackboard. Some slight changes were made in those plans afterwards, but

(Testimony of Edward Van Doorn.)

not on the page pasted on the blackboard, which, I think, is page 14. The page that shows the cylinders on Kirkland Creek bridge was not changed. In making the bid for sinking those cylinders we looked at the plans, the specifications, and the ground. The only place in the specifications where the cylinders are mentioned is the special specifications on Sheet 2 under the heading of "Steel Cylinders" of the page just prior to the proposal in Plaintiff's Exhibit No. 3. One of the provisions to which I refer contains the provision "Cylinders shall be sunk to bedrock."

I do not find any bedrock on the plans which are shown on the blackboard (Plaintiff's Ex. 3).

There is indication of bedrock at the three test pits. There is a note at each test pit. Test pit station 396 plus 50 sand and gravel and rock, elevation 4,023. It does not say bedrock. The symbol, or hatching, there indicates rock. There is nothing on the plans or in my experience in reading plans that would indicate to me that this broken line at the bottom of this plan indicates rock. That line does not indicate much of anything. It is just *as* assumed line. You might find rock and you might not. [332]

It might be that you would find bedrock there at the line, or it might be above it, or might be below it. This broken line indicates the center line of the bridge; it is directly under the center line at the station and the stations are in the center always unless noted otherwise. The stations and

(Testimony of Edward Van Doorn.)

the center line profile are right here, so designated on the map. The cylinder that is indicated there is on the downstream side of the bridge and the test pit near there is indicated on the center line. There is no indication of any cylinder on the upstream side. There was one to be put in on the upstream side. I know that from the second drawing from the bottom, which determined the location of the piers on the other side. I was there on the job up to the time Mr. DeWaard discontinued work on the cylinders.

There never was a test made by anyone working on the job to determine whether the rock actually was at the point at the elevation indicated by any test pit. No one ever dug down at the exact location of a test pit to ascertain whether the rock actually was at the elevation indicated by the test pit. The cylinders came near to it on this one numbered 13. At that point they struck the rock on one side of the cylinders and then the rock dropped right down about three feet on the other side. Part of the hole for the cylinder was at the elevation indicated by the test pit and the other part went deeper.

I did not assume that the bedrock was there as indicated. I heard the testimony of Mr. Lane. There is rock there where the test pits are. I heard his testimony when he said that he assumed that was bedrock. I knew it was rock—there was some rock there. I didn't assume that there was bedrock there because I have been digging a few

(Testimony of Edward Van Doorn.)

holes here in the state, and I noticed them up on the bridge at Prescott digging for bedrock on about half a dozen bridges there back of Whipple Barracks and the [333] bridge across Granite Creek, and I saw them up there looking for bedrock, so when we took this job here I did not assume there was any bedrock. They drove a big rod down; they dug as deep as they could, and they drove a rod down and they might have struck a big boulder there—that is no sign it is bedrock. My experience told me that any time we strike a rock below ground it is not bedrock.

I thought the state had put the rock at these three stations here on the center line, and I naturally figured that you could find rock within six or seven feet of that point anyway. You might have to go deeper—you might not go as deep.

I did not interpret the broken line as something for me to rely on as indicating that bedrock would be at the point where that broken line was drawn.

I have had something to do with bidding on state work for some time under practically the same form of contract and specifications, and have worked under the direction of the State Engineer in his interpretation of those plans and specifications, and the rule has been with reference to the special provisions in these specifications that the special provisions govern over the plans. That has been the rule of construction where there is a conflict. Our bid for putting down the cylinders was $40 a lineal foot; that included sinking the cylinders, the

(Testimony of Edward Van Doorn.)

furnishing of all material in place except the cement and reinforcing steel. The bid is all a lump sum. It must be in place. The steel shell costs you $12.50 and then it costs you to haul it out there, and then the balance of it is sinking the cylinder and putting the concrete in place—approximately $35 a yard for the concrete and the cylinder in place. That included sinking it down. It included everything except the cylinders and the cement. The state furnished the cement. I think our bid for [334] the same kind of concrete where it did not go into cylinders on other kind of work was $15 or $16, so that there was a difference of some $19 to cover other things besides concrete work and the cylinders. In that would be a contingency allowed for the possible sinking of the cylinders to a depth deeper than would be indicated by the dotted line on the plan. It does not cost any more to pour the concrete in the cylinders than it does in the form-box above that; but sinking the cylinder down to bedrock was the additional cost that we figured—pumping the water out and getting the cylinder down there. We could pour the concrete in the steel cylinder as easily as we can in the plain box. The material costs the same, except sinking the cylinder. That was what the additional cost was to be.

Our bid was not based on the idea that we would be entitled to stop at this precise elevation of 4,018 feet for the bottom of the cylinder. There is no elevation shown for the bottom of the cylinder. I

(Testimony of Edward Van Doorn.)

figured that I would have to go deeper. That has been my experience with the engineers that made the testing. I participated in the making of the contract with Mr. DeWaard. Stanley Cobham, of the firm of DeWaard and Cobham, first took it up with us. He called me on long distance phone from Prescott. The contract that was entered into with DeWaard & Sons was entered into on the basis of the proposal as submitted by Mr. Cobham. The negotiations that Cobham started were carried out with DeWaard with the exception of the name of the firm. The contract was finally made with DeWaard & Sons instead of with DeWaard and Cobham. In the phone conversation Mr. Cobham made me the proposition that he would give us 15 per cent on all items. He would take the contract at 15 per cent less than our prices. We called up Mr. DeWaard and asked him if Mr. Cobham had authority to talk for him, and he said yes, and then Mr. DeWaard came over [335] here and said he had his own arrangement with Mr. Cobham and the name would be DeWaard & Sons. We had the contract drawn up, and after it was drawn up we took it over to Armstrong, Lewis and Kramer. Judge Shute handled it. Mr. DeWaard objected to several of the paragraphs of the contract, and it was rewritten, I think, about half a dozen times by a public stenographer, and along about ten or eleven o'clock at night we finally got to where both sides were satisfied and the contract was signed. That contract, as then signed, was the result of

(Testimony of Edward Van Doorn.)

negotiations extending over a considerable period of time between us and Mr. DeWaard and the attorneys on both sides. The attorney for Mr. DeWaard was Judge Shute. Judge Smith represented the Phoenix-Tempe Stone Company.

I was in charge of the work on the ground after it started. Mr. DeWaard put Cobham in charge and sent over some equipment. Mr. Cobham continued in charge until Mr. Bunker came, in September, I think. But Mr. Cobham continued on the job and I requested Mr. DeWaard to inform me who was running the job, Mr. Cobham or Mr. Bunker, and he said Mr. Bunker was. In general the two kinds of work that Mr. DeWaard was to do under the subcontract were—he had all of the boxes, pipe, fords, etc., from one end of the job to the other; and then he had the Kirkland Creek bridge, the boxes, the culverts; and there were two bridges, 20-foot spans, that were on the upper end of the job. Considerable of the culverts were located in People's Valley. It was about 12 miles from the Kirkland Creek bridge to the end of People's Valley. They could go over the mountain between the two works at the two places. The same men were not working at the two places. They had a camp over at People's Valley and a camp at the bridge. They shifted men back and forth, as they all do. They might have a man working at the north part of the job, and then shift him down to the south [336] part, but they had two separate camps. The work did not proceed satisfactorily. DeWaard

(Testimony of Edward Van Doorn.)

sent a lot of equipment that could not be used—a crusher that was really too small, and an engine that couldn't even pull the crusher, and I stepped on Mr. Cobham about it, and he got Mr. DeWaard over, in August. Mr. DeWaard came over, and bought another second-hand engine, tore out some of the work, he had done in erecting the crusher, and after he was there the work did proceed for a time at a faster rate of speed, but it soon dwindled back again. There was lack of supervision and equipment. His equipment was never adequate. They did not handle the work. They just let things go as they may. There were two other subcontractors on the work. They did not delay Mr. DeWaard. He delayed them. The agreement made with Willis, Rogers, Coleman & Winsor about the pipes was made because they came hollering to me about filling up these gaps where these pipes were to go. They could not finish their grading, so they made an agreement with Mr. DeWaard to put the pipes in place and fill over them, and he was to pay them, I think, for placing the pipes, and he was getting paid for hauling and placing the pipes and he did do the work out there and they placed the pipe, and in that way they could fill over the pipe, and then he put the head-walls in himself on the pipe. They put in quite a number of pipes. I don't know how many they put in. That was a deal among themselves.

There was also a contract with Gore and Maze, subcontractors. The reason for that was the same.

(Testimony of Edward Van Doorn.)

Gore and Maze were about six miles ahead of DeWaard and did not want to go back and backfill over these boxes of pipes after they had moved their camp. They had a big bunch of stock and were moving them possibly six or seven miles and so they made an agreement with DeWaard & Sons [337] to have DeWaard & Sons backfill all structures on their job. The price fixed was 35 cents a cubic yard. DeWaard & Sons themselves agreed to build the approaches to the Kirkland Creek bridge. I have that agreement here. Thereupon said agreement was received in evidence without objection as Defendant's Exhibit "H." We finally put in those approaches at the bridge. I think DeWaard filled over the boxes on the other end of the job. We put in the north approach. I know nothing of any delay occurring over the inspection of Pier No. 4. I did not know anything about any changes in the plans being made until I saw the complaint. They made that deal between the resident engineer and Mr. DeWaard's superintendent. They made their own arrangements about it without consulting me at all. I don't know whether they put it in as extra work or whether they took the unit figure. I think they took the unit figure on the concrete and he paid them for any extra work that he had in carrying out the forms and changing the steel. I think we have an estimate there from the State Engineer on that.

The work on the Kirkland Creek bridge was very slow. They did not start it when they promised

(Testimony of Edward Van Doorn.)

they would. Mr. Cobham was pushing on the north end of the job and neglected the bridge. At the time he said he was afraid of the summer rains. He talked it over with the resident engineer and they did not put the cylinders in right then. They started the cylinders in the latter part of July. There were fourteen cylinders to be put in.

There were monthly estimates made up by the Phoenix-Tempe Stone Company for the work done by Mr. DeWaard each month. I gave Mr. Markham, our cashier, the figures, and he made them up according to my figures. They were based on the engineer's estimates. There was no difference between the figures on the engineer's estimates and on the estimates we made up for Mr. DeWaard. There was a difference in prices, in the amount of money, but not the [338] amount of work. I have the first estimate, which was for the month of June. We sent Mr. DeWaard the original of this duplicate. We sent him the originals of all estimates by mail to San Diego. The money for the first estimate was sent to San Diego, and the balance of them were put in the Phoenix National Bank for him, except that one that was attached.

Thereupon, the estimates for June, July, August, September, October, November, December and January were received in evidence without objection, as Defendant's Exhibits "I," "J," "K," "L," "M," "N," "O," "P." These estimates show the work credited to the job by the engineer's esti-

(Testimony of Edward Van Doorn.)

mate—work he has actually carried out as far as completing that portion of the work.

The $1,161.38 shown by the June estimate was turned over to Mr. DeWaard.

The $2,234.32 shown by the July estimate was put in the bank for Mr. DeWaard.

The item of "Note paid" in the August estimate is a note we endorsed for DeWaard in the Phoenix National Bank. He went over there and borrowed some money and wanted to give them an order, and the bank would not take an order but said if we would indorse the note they would give him the money, so we did; and they gave us orders to take it out of the estimate when it came due. The total amount which was due in August, including the note, was $5,498.99, and that was paid to him. The amount of the note and interest was deducted and paid to the bank.

The amount due Mr. DeWaard for his September work was $2,978.25. In August he put in 30 feet of cylinders, and in September 40 feet.

The $4,422.23 shown by the October estimate was put in the bank for Mr. DeWaard. This shows an increase over the September [339] estimate, and is about equal to the August estimate.

The November estimate became due on December 20th. It was not paid. He had so many outstanding bills that we had a right to hold them, and another thing, it was garnisheed. The bills are all in evidence here, I think. Every time I went to Kirkland I was jumped as soon as I got off the

(Testimony of Edward Van Doorn.)

train, and if I drove up they were chasing me all over the territory up there wanting to know when he was going to pay his bills. He had made them several promises and had not kept them. He had paid part of it, and the balance he would not pay, and some of them he did not pay at all. The Phoenix-Tempe Stone Company was under bond to the state to guarantee the payment of all bills of all snbcontractors, and Mr. DeWaard was under bond to the Phoenix-Tempe Stone Company to do the same thing, and the contract had a provision in it that if there was any evidence of unpaid bills we had a right to withhold his payment.

The garnishment was by L. D. Haselfeld. I think the amount was somewhere around $2,300. Haselfeld is a storekeeper up at Kirkland. His claim included half a dozen or more up there—a garage up there, and a meat dealer, and several others.

Estimates were made up for Mr. DeWaard for the work he did in December and January. There was no estimate paid him after the November estimate was refused.

The state furnished the steel. We got five cents for the steel placed and bent and he got 4½ cents. This just covered the hauling, placing, and bending. During the month of December Mr. DeWaard did not construct any of the steel cylinders. The amount of work Mr. DeWaard did in January as appears from the January estimates is $851.68 worth.

(Testimony of Edward Van Doorn.)

The Phoenix-Tempe Stone Company began work up there on the [340] second of February. On October 20th, or prior to that time, DeWaard had been pumping out the water and sinking the cylinders. He had put down, I think, the north four and was working on the south four. He had been working out there on them and he was having trouble on them; he could not pump the water out; he had a couple of small pumps there—the trouble was his equipment. He had a little two-inch pump there, and I think, a three-inch. Anyone who is familiar with underground streams knows you can't pump water out of a stream like that with a two or three inch pump, and especially with a bum motor on it, trying to work the pump which had an old gasoline engine—I don't know of what horsepower. He bought a new one, I think, which was about six horsepower. He put that on a four-inch pump. He knew that he could not pump with the pump he had there, and still he kept trying to pump, kept everybody using the same equipment that he started with, but he did put in a four-inch later on, and he put a five-inch hose on it, which did not help it any. These pumps were continually breaking on him—or his motive power. The engines were stopping on him, and in any event he could not lift the water out of the hole, that was his main trouble. Mr. DeWaard was there at the time. I told Mr. Bunker if he could get the proper equipment there he could get these cylinders down without any trouble at all. He said he was working

(Testimony of Edward Van Doorn.)

for Mr. DeWaard and he had to use the equipment he sent him. I do not know just the date, but Mr. Bunker said that the cylinders were going down further than the bedrock shows on the plans, and we had an argument about whether there was any bedrock shown on the plans, and I contended there was not, and he said there was, and I said there is no elevation shown at the bottom of any of these cylinders, and he said, "No, there is nothing, but," he said, "you can scale it." I said, "You know these specifications [341] say the plans are not made to scale," and he said, "I know that, but we could scale anyway." But before that I think he had constructed the north abutment, this four-foot square concrete on some of them, and he told me that the resident engineer was going by the cubic yardage for the concrete. The resident engineer was F. N. Grant. He was putting a square block of concrete on the cylinder to even up the cylinders so that they could put the piers on them, and he had these cylinders in place, and he was putting on a square block of concrete. The first ones he put on were, I think four feet, but they stuck out over the cylinders. They were too large, so they cut them down to 39 inches, and he was putting these on and he asked what pay, and I think he asked the resident engineer, and the resident engineer said he couldn't class that concrete to be in their bid. The cylinders I refer to on this were numbers 1, 2, 3, and 4, as indicated on this map. I think there was a square block on every one of cylin-

(Testimony of Edward Van Doorn.)

ders Nos. 1, 2, 3, and 4. They were put on there prior to the time that the first discussion arose over the extra work with me. I did not order that square structure to be put there. I did not know anything about it until they were finished. In my conversation with him afterwards, Bunker contended that that was not enough money for it, and the resident engineer said that that was the interpretation of the contract, that he would pay him for cubic yardage basis and which was about—a little over a third of a yard to the running foot, and he thought he should have more money for it, and I said, "What do you think is fair?" and he said, "Cylinder footage."

We were getting $40 a foot for putting the cylinders down and he was getting $34. I said, "Cylinder footage, that brings that concrete pretty expensive," and I said, "I don't think we can get that much," and he said, "I think that is what we are entitled to—cylinder footage"; and I said, "I will take it up with Mr. [342] Lane," and I went down and saw Mr. Lane. At that time there was nothing said that he must be paid at the basis of cost plus ten per cent. I went to Mr. Lane and talked to him and explained to him that it was on top of the cylinders, and he said, "Well, I will pay you cylinder footage for it"; and then we got that letter from him saying that he would pay cylinder footage, but we must put on the steel bands—if we did not put on the steel bands he would deduct the price of the cylinder.

(Testimony of Edward Van Doorn.)

Mr. Lane gave me what I asked without deduction if he put on the steel cylinder. It was optional whether he put on the steel cylinder or not. When I talked to Mr. Lane I did not know that these blocks had been put in, neither did Mr. Lane, but the square blocks were already on at least four cylinders on the north abutment. Those four cylinders were above what they contended was the bedrock. Mr. Lane stated the result of my conversation with him in writing. That was the letter of October 22d that has been received in evidence here; and the letter of October 27, 1924, is the reply to that letter from Mr. DeWaard. Mr. Lane wrote a letter about a week or ten days after that. That was the letter of October 31st that has been received in evidence. After Mr. Bunker had told me that he wanted cylinder footage, and I took it up with Mr. Lane, and got Mr. Lane's answer to that saying he would give us cylinder footage, they changed their minds on that by that time and they wanted something else. I learned that when I told them; I did not keep track of the date, but it must have been prior to the time Mr. DeWaard came up there and Mr. Bunker said that Mr. DeWaard then thought he should have force account—cost plus. The first argument was over getting concrete cylinder footage in place of the concrete pier. Up to this time the work had been dragging all of the time. It dragged right from the start. [343]

This statement for extra work in September, marked Plaintiff's Exhibit 11 was never handed to

(Testimony of Edward Van Doorn.)

me. I could not state positively when I first saw it—possibly in October some time.

The extra work statement for October was not handed to me, nor was the one for November, it was sent up to the office.

Referring to the statement in the letter of October 22d to Mr. Lane in which Mr. DeWaard states: "For your information we wish to state that in the latter part of August we notified the Phoenix Tempe Stone Company that the bedrock was not at the elevation shown on the plans and asked them to communicate with your office and advise us what to do, as we could not sink the cylinders deeper than shown on the plans at our risk without a written order from the Phoenix Tempe Stone Company or from your office." No such communication as that was made to me. The only person I had any argument about it at all with, or talked with about it, was Bunker, and he did not get there until along in September sometime. At the time referred to in said letter in August, Mr. Cobham was in charge.

These statements for extra work were mailed to the office. After these Lane letters of October 22d and October 31st, DeWaard kept on working. They worked spasmodically from that time on until about along in November some time, and then they quit on those four out there in the river. They kept working with those two and three inch pumps, and they could not get any place with them and still they kept on working with them; and then, one day I was down there and was talking to Bunker—after

(Testimony of Edward Van Doorn.)

they started asking for force account—and I said, "You don't expect to get force account for work you have been doing like this?" I said, "You have been working with the same pump on the same hole for [344] about two days and not doing anything, just lowering it to the same elevation," and he said, "What do you suggest?" and I said, "I suggest getting some equipment here to handle the water," and then he referred me that he was working for Mr. DeWaard and Mr. DeWaard was in San Diego.

I was present when the conversation between Mr. Conway and Mr. DeWaard took place on or about the 20th of October. Mr. Conway, Mr. Batchelor, who was Mr. DeWaard's bondsman, and myself drove up there, and Mr. DeWaard was there at the bridge. I don't know whether it was exactly the 20th, but it was around there some time—and we began to argue about these cylinders. I think the argument started over the unpaid bills, to begin with. Mr. Conway told Mr. DeWaard that he would have to pay those bills and Mr. DeWaard said, "Yes, I pay," but he didn't, and then they began to argue a little more, and then Mr. Conway says, "We won't pay you one cent more than what the state pays us and we will give you what the state pays us, and we will even give you the 15%." You see, we were getting $40 a foot and he was getting $34, minus steel shell, which would bring it down to about $27, and then if we took off about 15 per cent it would be about $15, and we agreed to give him the 15 per cent to get this thing started so he would go

(Testimony of Edward Van Doorn.)

to work. That 15 per cent was our profit, this 15 per cent we agreed to give him on these cylinders that went down, as he claimed, below where they should be—and they argued back and forth about it and finally Mr. Conway told him to keep still and go to work. Mr. Conway did not refuse to pay him at any time for his work. He got his estimates the next month. We refused to pay him more than the state paid us, however. Mr. Conway told him he would give him every cent the state paid us.

When the November estimate came due, about December 20th, [345] we had evidence of a lot of unpaid bills. They were calling up our office continually, and every time I went anywhere near Kirkland the storekeeper there, the garage-man, the man that owned the ranch that we were putting the road through, and several others, were asking me when they were going to pay. The rest of the sub-contractors had paid them every month, and Mr. DeWaard was the only one that was not paying his bills, and Mr. Haselfeld in particular asked me about it, and I said, "Mr. DeWaard is a responsible contractor; he has a bond up to cover this stuff," and he said, "Oh, well, that doesn't pay me."

On December 9th I came down from the job; it had been dragging right along and they were not doing anything over in People's Valley to amount to anything, and the work on the bridge was progressing very slowly; in fact, nothing was being done on those cylinders. I was responsible for this letter of December 9th (Plaintiff's Exhibit 30); the

(Testimony of Edward Van Doorn.)

work was not being prosecuted and the state was after me. The state has a clause in there, in their specifications, about the progress of the work, and they were continually complaining about the work on the structures. The other subcontractors were complaining and I could not get anything out of Mr. Bunker. He just referred me to Mr. DeWaard, and Mr. DeWaard would not come over. We spent money telegraphing to him and also going over there. We were over there three or four times in his office. He was there once and the other time I think he was up north somewhere. He was not prosecuting the work in a workmanlike way. Stuff was scattered all over the country up there. Part of the stuff the state had sent up and that he hauled out to the job was not being taken care of. The state informed me along in September and October that we had to pay for a lot of cement sacks that were not being taken care of, [346] and the work was not being done and he had no intention of doing it. That was evident to me from the way he had been working. I followed up the notice of December 9th; I took it up with his bondsmen. I wrote him more letters. He did not speed up the work. Right after that they all went away for a holiday. Worked there about a couple of weeks and then they went away for a holiday. He may have had a couple more men working there just before they went away for a holiday than there were on December 9th. He did not have very many. He promised to speed the work up, but he

(Testimony of Edward Van Doorn.)

did not do it. We kept on working through the holidays.

On December 29th I went up there on the train and had the resident engineer drive me out to the job, and went out to the bridge, and there was, I think, two or three men working on the bridge. I asked if Mr. Bunker was there and they said he was out of town; and there was two or three men working on the bridge and I asked who was in charge, and they said they were in charge and had their orders. Meantime, before this, I had evidence of some unpaid bills and some labor that had not been paid, so I informed the men. I said, "You can keep on working if you wish, but we will not be responsible for any more pay-roll." I told the carpenter that was in charge there. Then I went over to People's Valley where the other camp was, and they were doing the same thing over there. I did not forbid any of them doing the work, but told them we would not pay them.

In January, I went up there and asked them to turn the work over to me, which they refused to do. This was the same time I met Bunker. He met me in Kirkland and he asked me if I had stopped the work and I said, "No, but I did tell the men that I would not be responsible for any more pay-roll," and I said that I had paid some of the men but I did not intend to be responsible for any more pay-roll. [347] I asked him to turn the work over to me and he said he would not do it without a Court order, so I said, "All right."

(Testimony of Edward Van Doorn.)

I was up there again later, in January; I was up there two or three times in January. He was working there. I don't think he had very many men working. The last time I saw him was over in People's Valley. There was nothing being done at the bridge. I think he had one man fooling around there. He was working there in People's Valley. He had possibly five or six men there. It was not a proper force to prosecute the work with—he never did have a proper force up there. He closed the work down in People's Valley a couple of times; once that I remember of, and I asked him about it and he said that Mr. Grant had given him permission to close it down and ship the crew back over to the bridge, and he was waiting for his son or somebody to come down from some place up in California.

Our company did not want this work at this time, not after it had all been mussed up. A little work done here and a little work done over there—nothing completed. A little work started and nothing completed; that stuff that the state sent up laying all over the job and all mussed up. Had I taken it right over when it was first started we could have put it through just as we did the grade. We asked the surety company to take it over; they didn't do it. The work was actually taken over the 2d of February by us. I went up the latter part of January with Mr. Baker and there was no one working there for Mr. DeWaard. There was one man up at the bridge; he said he was a caretaker; and there

(Testimony of Edward Van Doorn.)

was no evidence of anyone else, and Mr. Bunker had left that day for California. He had also shipped out the equipment a couple of days before. He shipped out a mixer and wheelbarrow. Mr. Baker was given a letter by a man who was up there. He said that his orders were not to turn the work over to us, and I saw [348] what had happened, that Mr. Bunker had walked off the job, so I went back down to Phoenix and took Mr. Baker down and organized a crew and sent them up there. I had nothing to do with the men that were working for Mr. Bunker. I paid them down here in Phoenix, along in January. Bunker came down and said there was a lot of unpaid labor; these fellows needed the money and Mr. DeWaard would not pay them, "Well, you laboring men go over there to the surety company and they will possibly pay the men" and I took Mr. Bunker over to the surety company and they would not pay; said they would not pay except on an order from Mr. DeWaard; and they were all running around there and the working men needed their money, and they didn't have anything to carry them over, so as fast as he sent them over to me I paid them, in fact, I paid some that did not come that he brought in orders for. He said Mr. DeWaard had given him some money, however, to take up some of these checks, but it was insufficient. The only way I have of telling what percentage of the work was completed when the Phoenix-Tempe Stone Company took charge in February, is from the engineers' reports, and they always seemed fair

(Testimony of Edward Van Doorn.)

enough to me. Mr. Grant, the resident engineer, makes these reports.

Cross-examination—EDWARD VAN DOORN.

The controversy over the bridge arose over the fact that Mr. DeWaard wanted authorization to go down to bedrock as extra work. He asked for authorization to pursue that work under the extra work clause of the contract. I presume that was the cause of all the difficulty, except that he was not progressing with the work as he should have done. The first time I had any argument about it was in October. When Mr. Cobham was working on the job he never said anything about it. He wanted authority to perform *th* as extra work under the extra work clause of the contract, but previous to that his concern had informed me that what they wanted [349] was cylinder footage. I got that authority. DeWaard contended it was extra work and the state contended it was the same character of work up to the time he quit. If the state tells you it is extra work, whether you have a written order or not, they never refuse payment, but they tell you before you start on the work whether it is extra work or not. If they claim it is not extra work and you go ahead and perform it you do not get paid. If you do the work and it happens to be extra work you cannot put in a claim for it if you haven't been authorized to do it as extra work. So there was a controversy between the parties as to whether or not this constituted extra

(Testimony of Edward Van Doorn.)

work. That was the reason it was not authorized as extra work.

I believe we started work on May 17th, the date stated in the pleadings as the date the contract was signed. Gore and Maze, a subcontractor, was on the job at that time. Their subcontract is dated the 13th day of May, and provides they will open a camp not later than the 17th of May, and begin the work not later than May 19th, and they did.

We took the DeWaard contract over on the 2d of February because the work was not being prosecuted fast enough. His time had expired and the state threatened to do something to us. We finished it about the first part of June. I did not get our final estimate until July because Mr. DeWaard had filed a claim. However, the job was accepted on the 19th of June. There was a lapse of two weeks there on account of tearing out forms under the structures. I did not say we worked until the 19th of June. There was a lapse of approximately two weeks before they will accept it in order to get the forms out from underneath the structure and the Federal Bureau did not always send a man up the day you asked them to. [350]

Thereupon the estimates prepared by the Phoenix-Tempe Stone Company on DeWaard's subcontract for the months of February, March, April, May and June, were received in evidence as Plaintiff's Exhibits No. 62, 63, 64, 65, and 66, without objection.

(Testimony of Edward Van Doorn.)

I was not up there after we took the work over. But I can tell by the engineer's estimates as to the progress of the work. According to the engineer's estimates, when we took the work over, the bridge was 44 per cent completed. DeWaard & Sons constructed 1,503.4 cubic yards of structure excavation; that is approximately all there was on the job, so there was nothing left for us to do on that. I think they had done practically all of the structural excavation when we took it over. I think we had to do a lot of it over again and didn't get any pay for it. If water runs down and fills up the excavation you are liable for it. You just go ahead and perform it again. It depends on the engineer whether or not they give you the full amount done on the estimates. It is not the custom to always hold back on excavation and embankment.

We did not start on the work until the 2d of February, so that all estimates for work done previously to that time was done by DeWaard & Sons. They did 109.90 yards of Class C concrete, and we built whatever the estimate called for. DeWaard & Sons in their contract agreed to construct three cattleguards. When we took the work over they had constructed five. They constructed 208.71 yards of rubble masonry, and we built what the final estimate called for. We built no more rubble masonry than the contract called for. They laid 649 lineal feet of 24-inch pipe and we laid 9 feet. They built 442 lineal feet of 30-inch pipe and we built 4 feet.

(Testimony of Edward Van Doorn.)

I made no mistake in telling you that they had not been prosecuting this work right. If you will take the major items [351] you will find the difference. They built 228 feet of 36-inch pipe and we built one foot.

I don't know how much steel they hauled. We hauled a very small amount of it. Nearly all the steel was hauled by them, but not placed or bent. Not very much of it was placed or bent by them. The estimates did not include anything except the finished concrete. If there were some forms up, the steel bent, and all ready to pour, they would not show it in the estimate at all.

They did all the excavation for structures, 460 cubic feet. The engineer had allowed them for more than they did.

They did 123.7 cubic yards rock back-fill and we did none.

They had done 259.95 cubic yards of Class A concrete in the bridge when we took it over, and we did 276.71. We worked four months and they worked eight.

They did all the Class B concrete work, 2,012 cubic yards.

They put down 100 lineal feet of cylinders and we put down 40. The fact that they were put down partly did not help us any. I won't say that those cylinders they abandoned were below the elevation shown on the plans. They abandoned them and let the stuff fill up. Those cylinders were in the river bed. The forms had not been made for sinking

(Testimony of Edward Van Doorn.)

them. They constructed 27,297 pounds of cylinder steel for the structures and we constructed 42,140. We bent and put that much in; it was all there approximately. The steel hauling item was a small item on the job. Placing and bending is what cost. They did not do very much work besides that that was called for in the plans. I think they had the wire hauled out for the fence. I would not say that they had a lot of sand and rock hauled that we got the advantage of. They had a car of cement unloaded at Kirkland and more than 3,000 feet of lumber; 3,000 feet would build hardly anything. They did not have the forms ready for 140 yards of concrete [352] that we filled. Gore & Maze were seven miles ahead of them.

At the time this contract was made whereby Gore & Maze were to do this work, which is dated the 20th of June, Gore & Maze were about two miles ahead of them. At that time DeWaard & Sons had been on the job about two weeks. I told the creditors that Mr. DeWaard was a responsible contractor and he had a bond guaranteeing the payment of his bills. The Standard Accident Company was his surety and was fully able to pay all bills, if they would. We did not honor the Haselfeld order because DeWaard had many more bills. There were orders out for about as much money as he had coming. I did not go to the garage-man at Kirkland. I did not go around to inquire of the various creditors. They came to me and inquired. I do not recall having received a telegram from DeWaard

(Testimony of Edward Van Doorn.)

on October 4th, stating that they had gone down below bedrock and it was not there. I do not state that we did not receive it. I don't know who was in the office at this time.

I was willing to leave this dispute to arbitration. Mr. DeWaard asked me if I would make an appointment with the State Engineer, Mr. Lane, which I did, and Mr. DeWaard never showed up. On November 6th, we wrote to DeWaard & Sons telling them that the State Engineer was willing to pay for the increased length at the price bid and asked them to give us their idea of the proper credit under the circumstances. DeWaard told me that he would leave it to Mr. Lane, but he failed to put in an appearance, so we could not come to any agreement when he would not show up.

On the 17th of December, 1924, when DeWaard wrote us a letter stating that he expected to be finished with all the work on or about February 4, 1925, except the Kirkland bridge which was being held up on account of the cylinders, the four cylinders were not below bedrock line. [353]

I didn't give them any orders for extra work. I didn't give him the order because I didn't consider it extra work. We had a right to stop the work under our contract with DeWaard & Sons and when I found no one there in charge of the work and men lying around in camp expecting to get paid for it, I consider I had the right to tell them that we were not responsible for paying men for lying around the camp. There was no one there

(Testimony of Edward Van Doorn.)

in charge. They said they did not know who was keeping the time. This was after Christmas, a day or two before New Year's Day. Our men worked during Christmas week. Laboring men as a rule are glad to work. If they want to lay off we do not get men to take their job unless we are pressing the work.

Referring to the state's estimate of May 31, 1925, I notice the item of 2,661 yards of concrete at $23.16 to DeWaard & Sons. They had no price of $23.16 in their contract with us. That item should be lineal feet of concrete. They had no price with us for the construction of concrete by lineal feet. That represents the concrete block on top of the cylinders that they put it. That item of $23.16 per lineal foot of concrete is in the estimate of May 31, 1925. DeWaard & Sons did not receive any pay from the state for the construction of any blocks on top of the cylinders. They constructed the blocks, but the estimate wasn't turned in by the resident engineer because they wouldn't accept that price.

I did not call up Vermeersch and try to get him to bring suit against DeWaard & Sons. [354]

Redirect Examination. (657)

The square block on top of the concrete was paid by the lineal foot after we had made this supplemental agreement with the Highway Department. When I went to Mr. Lane I spoke to him about construction of the cylinders. He agreed to pay

(Testimony of Edward Van Doorn.)

the cylinder footage for that block of concrete put on top of the cylinders; the lineal footage we had up, less the price of the steel shell. That was along in October sometime, I think. They put it on the estimate when the final estimate was made up, or on the one just before the final estimate. They put the amount on when the supplemental agreement was paid for. The total amount involved was about $725.

Of the work in People's Valley at the time when we took it over, the pipes were in place. They possibly had constructed one or two fords; constructed two boxes and the floor of another. There were 14 boxes to be put in there and they completed two and we completed 8 of the 12. I don't know whether all the head-walls were on the pipes or not. The major portion of the work in People's Valley was left uncompleted. That work was not in any way affected by anything that was going on at the Kirkland bridge. The major item of this subcontract was Class A concrete. Of the total work under the subcontract they completed 53 per cent and we completed 47 per cent. At the rate Mr. DeWaard was going on his work on December 9th, and for a week prior and a week subsequent thereto, it would have taken DeWaard about five or six months to complete the People's Valley work, and at the rate they were going at the time it would have taken a couple of years to build the Kirkland bridge.

The provision in the specifications, a part of our contract with the state providing for annulment of

(Testimony of Edward Van Doorn.)

the contract, Section 31, [355] was not enforced against us in this case, but there was considerable said about it by the state. A number of times they spoke about the progress of the work, and along the latter part of the time they called my attention to this paragraph and said if I did not expedite the work something would be done; they possibly would take it over. This was along in December when they threatened they might take it over. There was further discussion on this December 26th, when they allowed us some further time. Mr. Lane said that he was satisfied with the progress of the grading, but not with the structures; that the structures had never been satisfactory; that he was willing to give us an extension of time because the contractors on the grading and surfacing had done their best, but that the subcontractor on the structures might claim they had reason to have an extension of time for the same reason the other contractors did, but that he didn't think they were entitled to any extension of time from the way they had prosecuted it from the start. The contractors on the structures were DeWaard & Sons.

The provisions of Section 31 were inserted in our subcontract with Mr. DeWaard, but Section 30 was not inserted in said subcontract; in place of it we specified he should complete the contract within seven months time. There was no provision for extension.

In regard to the extra cost of these cylinders, the superintendent told me he considered if he got cyl-

(Testimony of Edward Van Doorn.)

inder footage for these blocks he was putting on top of the cylinders he would be satisfied, and when we took that matter up with Mr. Lane he agreed to pay for cylinder footage; and when I told the superintendent that, he said Mr. DeWaard wanted cost plus, as extra work. I imagine at first he would have agreed to the cylinder footage. Then Mr. DeWaard said if he could talk to Mr. Lane he could convince Mr. Lane he should have cost plus, and I said, "Mr. Lane has given me his [356] answer, however, I will take the matter up with Mr. Lane and arrange a meeting," which I did, but Mr. DeWaard never put in an appearance. This must have been around November sometime. Must have been somewhere between the 15th and the latter part of November. At that time I was over in San Diego; left word at Mr. DeWaard's office; I also sent a wire up to Kirkland. I think Mr. DeWaard was in Oakland. When I got back to Kirkland he wasn't there. They told me at his office he would be there, but he wasn't there. That was the only time Mr. DeWaard ever talked to me about arbitration.

On or about the 2d of January, our company received a letter dated the 29th or 30th of December with reference to arbitration. At that time, the contract had expired. There was a dispute between DeWaard and Gore & Maze about the hauling over the road. Gore & Maze had completed their grading and Mr. DeWaard would haul material over the finished grade, cutting it up. Gore & Maze objected

(Testimony of Edward Van Doorn.)

to it, and the resident engineer objected to it. Then Mr. DeWaard's superintendent said he would finish the grade up after he cut it all to pieces, but he failed to do so, and Gore & Maze got rather hostile about it. They had to bring their teams back. I think they ordered Mr. DeWaard to keep off the grade if he wouldn't finish it up as he agreed to. The others used the old road practically all the way from one job to another, except for one mountain cut.

Recross-examination.

It might be that it figured 57 per cent instead of 53 per cent of the contract that DeWaard had completed. That was work estimated as completed by the state. It depends upon the class of work whether it takes into consideration anything that might have been done toward the completion of the balance. It doesn't take into consideration work which has not been accepted by the engineer. [357] I imagine in a job like that it would figure somewhere around eight or nine dollars per cubic yard for pouring the cement. Less than $1,000 of that item would be for pouring. The balance would be for setting up forms and getting materials, getting the rock and crushing it, and getting the sand there. There was not very much rock and sand at the bridge when we took the work over; none of it had been accepted. Mr. DeWaard handled his own material three or four different times after he hauled it on the job. None of the forms were completed and accepted. There was considerable work done

(Testimony of Edward Van Doorn.)

on them, but we didn't understand that the engineer would accept it. He put that second span—in the air. He was told at the time he was doing it at his own risk. He didn't even have the cylinder to set it on. He worked right up to the cylinder. No, he didn't do everything he could do until he got the cylinder in from the north end. That picture shows what forms were done. There is a cylinder at approximately the end of the bridge. That is shored up because he couldn't build the form down here because the cylinder isn't in. That is one of the cylinders he had trouble with. The concrete in there wasn't poured. The forms aren't complete. None of that work in there is taken into account in this estimate. The engineer couldn't make the estimate on the form until the concrete is poured. You don't get paid for putting up forms.

We paid to the state the penalty imposed by our contract. I think the same penalty was imposed on DeWaard by our contract with him. If everything else had been completed except the structures, that penalty would have come out of DeWaard & Sons.

Redirect Examination.

The forms for pouring the concrete on the bridge shown in the picture were not accepted by the state at the time we took over the work. My idea is they were not properly built for good construction. [358]

(Testimony of Edward Van Doorn.)

Recross-examination. VAN DOORN. (670)

The fact that the cylinder couldn't be built was not the reason that they didn't complete the first span on the form. There were four spans in the bridge and the first span was complete. They could have put it in. The deck of the second span was not complete. It had no cylinders. They hadn't put any steel in there. One of the things that was holding up this span was that the cylinder wasn't in. We had an extension from the engineer. We didn't advise DeWaard & Sons because their contract had expired. We didn't give DeWaard the advantage of the extension we got.

Redirect Examination.

We got that extension in January some time. There was other work that could have been completed before the pier was in. [359]

TESTIMONY OF F. N. GRANT, FOR DEFENDANTS.

Direct Examination.

My name is F. N. Grant; residence, Arizona; occupation, civil engineer in the employ of the State Highway Department for eleven years, under State Engineers Cobb, Atwood, Maddock, Holmquist, Goodwin, and LeFebvre. I have had considerable experience in highway construction work.

(Testimony of F. N. Grant.)

The test pits and preliminary survey for the Kirkland Creek Bridge were made under my direction. I located the line and had two of my men make the test pits. In making the test pits the boys dug holes approximately six feet in diameter until they struck water, and then we took churn drills and long steel bars and put them down until we struck something solid, measured the depth, from the ground line to where we struck water and from there to solid—a churn drill makes a hole probably an inch or an inch and a quarter in diameter. These test pits are indicated on the plans in evidence here. Only three test pits were put down. Not a single one was put down upon the exact location of any cylinder. The nearest cylinder was from 12 to 15 feet from the test pit.

The test pits were put on the center line and about five feet from where the cylinders were. The cylinders are eight feet off the center line. That would make the test pits approximately ten feet from where the cylinder went down—that is approximate.

The plans were drawn by the bridge department under Mr. Hoffman, from the data supplied by me. I have had some experience in reading plans. The elevation of the bottom of the test pits by the figures marked on the plan shows elevation of rock 4,018, 4,023, and 4,020. 4,018 is the elevation above sea level; 4,023 and 4,020 are the same thing. 4,018 is the deepest elevation of any of the test pits. That is at the north end of the

(Testimony of F. N. Grant.)

bridge where the cylinders are in red pencil, 1, 2, 3, 4. [360]

I cannot find on that plan any representation of the bottom for any cylinder. It is not shown. Also, the details of the plan don't give any figures showing the distances from the grade line to the top or bottom of a cylinder, not a single one of them. The broken line connecting the bottom of the test pits indicates that bedrock will be approximate along that line. By approximate, I mean the plans showed there were three test pits put down below water, and anyone familiar with construction should know that we didn't know what is between these, but we assume the bedrock runs fairly uniform. That is one of the approved methods of locating bedrock; just drilled with a churn drill. We went down twice in each hole—put the bar down one side of the hole and then moved it over two, or three, or four feet and put it down again in case we should hit a boulder. We went down until we thought we hit bedrock. We sent in a sketch on which a report to the State Engineer was made. We were sent out there to locate the line. Our purpose in sinking the test pits was to get an approximate determination of bedrock. I satisfied myself we were close to bedrock. The report to the State Engineer was the sketch. In that sketch we indicated that was bedrock. I don't think anybody else would know from the same method whether or not it was bedrock. What we actually did was at that time *was*

(Testimony of F. N. Grant.)

open to whoever might bid by inquiring at the office of the State Engineer, so if any bidder wanted to know just what we had done in the way of locating bedrock he could go there and ascertain it. He could get the information that what we had done was to run the core drill down there. On different classes of bridges if you drive piling you can specify a definite elevation and build the piers from that up. If we had specified a definite elevation for the bottom of the cylinders there would be an elevation shown for each cylinder, [361] either at the bottom of the cylinder or at the top there would be figures like this, 4,018, or 4,019, or whatever it might be. There isn't anything of this kind on the map because we didn't know exactly where the cylinders were to go. There is a detail of this same thing on the next page, Sheet No. 15. These details don't show any elevation for the cylinders. We show from the top of the bridge which elevation can be figured exactly from the grade line here; we show figures down to this point, 7 feet, 3 feet, 6, 3½, and 15 inches, and the spacing of the steel in different groups, but the last few feet there's no figures shown, because it isn't known. We don't know how far the cylinders will be. The placing of the steel in the last few feet is all estimated. The figures on the left-hand side are the designation of the steel—⅝ square steel. That has nothing to do with the distance between those lines indicated there. On all the other points on this, the distances are in-

(Testimony of F. N. Grant.)

dicated by the figures on the right, which are figures in feet and inches, and the omission to put the figures in on that last point certainly was purposely done, because we didn't know how deep the cylinders would be. We knew approximately. This method of putting down only a few test pits to get some idea of where the bedrock is, is a common method for constructing such bridges as the Kirkland Creek Bridge, a bridge of that type where there is no more money involved.

I don't consider it essential in making an intelligent bid to know the exact location of bedrock. The cost of the excavation does not vary greatly with an increase of a foot or two, or three, in depth, unless you should happen to strike water and then go below the water in that extra two or three feet; but if you are working in water right along that extra two or three feet wouldn't materially matter. If you are working below water any [362] way, two or three feet deeper I don't consider as changing the character of the work under the classification of the specification referred to as extra work.

The ground water elevation indicated by the water line on this map is 4,026.

The indication of the high water line is marked in plain English, "High Water Line." The other is marked, "Ground Water Elevation, January 17, 1923," and gives it in figures. The line that is marked "ground line" is in plain figures. There is nothing stating what this broken line

(Testimony of F. N. Grant.)

down below here is. To my mind that signifies that he assumes something that isn't seen. That is not the same thing as these lines here on the cylinders that are dotted. The difference is, underground you can't see them. You know definitely the dimensions of the cylinders.

There is a difference in this line below, which runs along as a broken line, and these lines here which are short dots. These lines running down you know they will be there. This line (indicating lower horizontal line) represents something assumed. This is not a straight line connecting this, it is a waved line, a test line, uncertain.

To be exact, that hatching along that line shouldn't have extended out on this plan; it should have stopped right under the test pit.

This pier located here in the middle shown as on the top of that hatching is not at the same place. I can tell that it isn't because that was put down on the center line and the cylinder is eight feet off the center line. The plan, looking at this, don't show that at all. You are looking across the bridge. You would have to refer to the one up above for that. By referring to that you could tell. These lines do locate the test pits on the center line, marked Station 395 plus 7, 396 plus 15, and so on. [363] If that were anywhere else except the center line it would be noted. The stations are always located on the center line unless otherwise marked; and I know by this drawing here that the cylinders are on the side.

(Testimony of F. N. Grant.)

I am familiar with the book in the State Engineer's office in which the State Engineer has the contract and specifications and the special provisions to submit to contractors for bids. The plan of preparation of that book is that there are certain sets of general specifications that would apply to any job, and the special provisions covering the job in particular that is being bid on. In the case of the contract here in question, this Plaintiff's Exhibit 4 is the book containing the contract and specifications. By the general specifications in that book I mean they are the specifications referring to any job. Some of these are printed and some are not printed. Special provisions are so marked, indicated right here, "Special Provisions." In this case the special provisions relate entirely to the Kirkland Creek Bridge. That is the only special provision on that job. The special specifications prevail over the general. Section 2 of the Special Provisions "Steel Cylinders" reading: "The cylinders shall be sunk to bedrock" is one of the special provisions I refer to; and also the one reading: "The basis of payment for cylinders shall be the unit price per lineal foot of cylinder named in the schedule," etc. Those special provisions govern over any provision in the general specifications.

I was in charge of this work on the White Spar Road in 1924–1925, on behalf of the State of Arizona as resident engineer. As such resident engineer my duties were to supervise the carrying

(Testimony of F. N. Grant.)

out of the plans and specifications, and make out monthly estimates. I was the representative of the state on the job—to make reports to Mr. Lane, the Chief Engineer. No long period of time ever elapsed when I was not out there when the construction work was [364] going on. There were other subcontractors on this work besides Mr. DeWaard. They were also under my supervision, in a way, although we dealt only with the contractor, the Phoenix-Tempe Stone Company, which was responsible to us. I knew the other subcontractors were there, and saw their work and what was going on. I never saw any of the other subcontractors materially delay DeWaard & Sons in their work. There was complaint the other way around. Some of the subcontractors came to me to see if we couldn't have the structure work done so their work wouldn't be materially delayed, but I told them they would have to take that up with the Phoenix-Tempe Stone Company. The structure work proceeded slowest. DeWaard & Sons were doing that work. The wing walls on the bridge were exactly as shown on the plans. They were not incorrect. The plans show one wing wall resting on the ground, and that is the way the bridge is built. I can't tell this from the photograph. The charge in the complaint that the ground line shown by the plan for the Kirkland Creek Bridge is incorrect is a mistake. (687)

The water line shown on the plans is dated January, 1923, and the work was going on in June,

(Testimony of F. N. Grant.)

1924, and it doesn't stand to reason that the water is going to remain at the same elevation all the time. While the work was in progress the water went up, and fell back, and my remembrance is that we struck water less than a foot above where it is shown on the plans. My records show it wasn't over a foot and a half above. The plans distinctly show the date we located the water line and it was correct as we located it on that date. It was higher during construction but not more than a foot and a half at the outside. This sheet of the plans marked "Void" with red pencil shows the difference in the steel list, and also a note at the bottom of the page showing 3.13 cubic yards Class A concrete and 3,863 pounds of steel added under revisions, additional work. That is the difference between this sheet and [365] the sheet on the blackboard (Plaintiff's Exhibit 3).

The other sheet marked "Void" is the detail sheet, which was changed from the sheet on the blackboard (Plaintiff's Exhibit 3) by the addition of a tie-beam across the abutment, the bottom of the abutment, the back end of the two abutments. I don't know when the change was made in the field. I didn't pay any attention to it—it was such a small matter.